APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

Petitioner

—*vs.*—

THE STATE OF OHIO,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

PETITION FOR CERTIORARI FILED APRIL 6, 1977
CERTIORARI GRANTED JUNE 27, 1977

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-6513

WILLIE LEE BELL,

Petitioner

—*vs.*—

THE STATE OF OHIO,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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INDEX TO APPENDIX

A. RELEVANT DOCKET ENTRIES

1. *Trial Court—Court of Common Pleas*

BIND-OVER ENTRY, 11-4-74

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS
JUVENILE DIVISION

J.C. 74-08044

ENTRY

IN RE:

WILLIE LEE BELL

THIS CAUSE CAME ON THIS DAY TO BE HEARD, AND THE COURT AFTER FULL INVESTIGATION AND AFTER A MENTAL AND PHYSICAL EXMINATION FINDS THAT THE ACT ALLEGEDLY COMMITTED BY WILLIE LEE BELL WOULD BE A FELONY IF COMMITTED BY AN ADULT.

THE COURT FURTHER FINDS:

1. WILLIE LEE BELL WAS SIXTEEN (16) YEARS OF AGE AT THE TIME OF THE CONDUCT CHARGED.

2. THERE IS PROBABLE CAUSE TO BELIEVE THAT THE CHILD COMMITTED THE ACT ALLEGED.

THE COURT FURTHER FINDS AFTER DUE CONSIDERATION OF (1) THE CHILD'S AGE; (2) THE CHILD'S PRIOR JUVENILE RECORD; (3) THE EFFORTS PREVIOUSLY MADE TO TREAT OR REHABILITATE THE CHILD; (4) THE CHILD'S FAMILY ENVIRONMENT; (5) THE CHILD'S

SCHOOL RECORD; (6) AFOREMENTIONED MENTAL AND PHYSICAL EXAMINATION OF THE CHILD, THAT THERE ARE REASONABLE GROUNDS TO BELIEVE THAT:

A. HE IS NOT COMMITTABLE TO AN INSTITUTION FOR THE MENTALLY RETARDED OR MENTALLY ILL.

B. HE IS NOT AMENABLE TO CARE OR REHABILITATION IN ANY FACILITY UNDER LEGAL RESTRAINT, INCLUDING, IF NECESSARY, FOR THE PERIOD EXTENDING BEYOND HIS MAJORITY.

C. THE SAFETY OF THE COMMUNITY MAY REQUIRE THAT HE BE PLACED UNDER LEGAL RESTRAINT, INCLUDING, IF NECESSARY, FOR THE PERIOD EXTENDING BEYOND HIS MAJORITY.

IT IS THEREFORE ORDERED THAT WILLIE LEE BELL, MAKE HIS APPEARANCE BEFORE THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO, ADULT DIVISION, FOR SUCH DISPOSITION AS SAID COURT IS AUTHORIZED TO MAKE FOR A LIKE ACT IF COMMITTED BY AN ADULT: WITH BAIL BOND OF FIFTY THOUSAND DOLLARS ($50,000.00) SURETY.

/s/ [Illegible]
Judge
Court of Common Pleas
Juvenile Division

DATED THIS 4TH DAY OF NOVEMBER, 1974

INDICTMENT

11-22-74

No. B743172

HAMILTON COUNTY COMMON PLEAS

THE STATE OF OHIO

vs.

WILLIE LEE BELL AND
SAMUEL HALL

Indictment for

AGGRAVATED MURDER 2903.01 R.C.

AGGRAVATED ROBBERY 2911.01

KIDNAPPING 2905.01 R.C.

A TRUE BILL

/s/ Albert Schaefer, Sr.
Foreman of the Grand Jury

Reported and filed this 22 day of November, A.D. 1974

ROBERT D. JENNINGS
Clerk of Hamilton County Common Pleas

By /s/ Eugene Montesi
Deputy

SIMON L. LEIS, JR.
Prosecuting Attorney
Hamilton County, Ohio

ARRAIGNMENT Nov. 26, 1974

PLEA OF NOT GUILTY ENTERED
(as to Hall)

ARRAIGNMENT DEC. 3, 1974

PLEA OF NOT GUILTY ENTERED
(as to Bell)

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County:

Term of OCTOBER in the year nineteen hundred and SEVENTY-FOUR

HAMILTON COUNTY, SS.

FIRST COUNT

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that WILLIE LEE BELL AND SAMUEL HALL on or about the SIXTEENTH day of OCTOBER in the year nineteen hundred and SEVENTY-FOUR at the County of Hamilton and State of Ohio, aforesaid, PURPOSELY CAUSED THE DEATH OF JULIUS GRABER, WHILE THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2903.01 OF THE OHIO REVISED CODE.

SECOND COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT WILLIE LEE BELL AND SAMUEL HALL ON OR ABOUT THE SIXTEENTH DAY OF OCTOBER IN THE YEAR NINETEEEN HUNDRED AND SEVENTY FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, PURPOSELY CAUSED THE DEATH OF JULIUS GRABER, WHILE THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING KIDNAPPING, IN VIOLATION OF SECTION 2903.01 OF THE OHIO REVISED CODE.

THIRD COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT WILLIE LEE BELL AND SAMUEL

HALL ON OR ABOUT THE SIXTEENTH DAY OF OCTOBER IN THE YEAR NINETEEN HUNDRED AND SEVENTY-FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, IN COMMITTING A THEFT OFFENSE, INFLICTED SERIOUS PHYSICAL HARM ON JULIUS GRABER, IN VIOLATION OF SECTION 2911.01 OF THE OHIO REVISED CODE.

FOURTH COUNT

AND THE GRAND JURORS AFORESAID UPON THEIR OATHS AFORESAID DO FURTHER PRESENT THAT WILLIE LEE BELL AND SAMUEL HALL ON OR ABOUT THE SIXTEENTH DAY OF OCTOBER IN THE YEAR NINETEEN HUNDRED AND SEVENTY-FOUR AT THE COUNTY OF HAMILTON AND STATE OF OHIO, AFORESAID, BY FORCE AND/OR THREAT REMOVED JULIUS GRABER FROM THE PLACE WHERE HE WAS FOUND FOR THE PURPOSE OF FACILITATING THE COMMISSION OF A FELONY, AND FAILED TO RELEASE THE SAID JULIUS GRABER IN A SAFE PLACE UNHARMED, IN VIOLATION OF SECTION 2905.01 OF THE OHIO REVISED CODE.

SPECIFICATION TO THE FIRST COUNT

THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE IN THE FIRST COUNT OF THE INDICTMENT WAS COMMITTED WHILE THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING AGGRAVATED ROBBERY, IN VIOLATION OF SECTION 2911.01 OF THE OHIO REVISED CODE.

SPECIFICATION TO THE SECOND COUNT

THE GRAND JURORS FURTHER FIND AND SPECIFY THAT THE OFFENSE IN THE THIRD COUNT OF THE INDICTMENT WAS COMMITTED WHILE

THE SAID WILLIE LEE BELL AND SAMUEL HALL WERE COMMITTING KIDNAPPING, IN VIOLATION OF SECTON 2905.01 OF THE OHIO REVISED CODE.

/s/ Simon L. Leis, Jr.
Prosecuting Attorney
Hamilton County, Ohio

/s/ [Illegible]
Assistant Prosecuting Attorney

INSANITY PLEA

12-12-74

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

Case No. B-743172

STATE OF OHIO, PLAINTIFF

vs.

WILLIE LEE BELL, DEFENDANT

PLEA OF NOT GUILTY BY REASON OF INSANITY

The Defendant, by and through counsel, Fred H. Hoefle and Albert Mechley, Jr., on appearing in open court and after being duly advised of his constitutional rights and the consequences of all pleas which may be entered to the indictment on his behalf, herewith pleads not guilty and not guilty by reason of insanity to the charges of aggravated murder, aggravated robbery and kidnapping as set out in the indictment, No. B-743172.

/s/ Willie Lee Bell
WILLIE LEE BELL
Defendant

/s/ Fred H. Hoefle
FRED H. HOEFLE
Co-counsel for Defendant

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.
Co-counsel for Defendant

CERTIFICATE OF ATTORNEYS

The undersigned, attorneys for the Defendant, Willie Lee Bell, hereby certify:

1. We have read and fully explained to the Defendant all the accusations contained in the courts in the indictment against him and all of the pleas which he may enter with respect to them, including the consequences of each plea.

2. We have advised him with respect to his rights to trial, including but not limited to the right to a jury trial, the right to be confronted with and to cross-examine witnesses against him, the right to testify in his own behalf, and the privilege against self-incrimination.

3. To the best of our knowledge and belief, each statement set forth in the preceding plea by the Defendant and this certificate are in all respects accurate and true.

4. The plea of not guilty and not guilty by reason of insanity offered here by the Defendant accords with our understanding of the pleas the Defendant wants to offer to the indictment.

Signed by us in open court in the presence of the Defendant on the 12th day of December, 1974.

/s/ Fred H. Hoefle
FRED H. HOEFLE
Co-counsel for Defendant

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.
Co-counsel for Defendant

ENTRY AMENDING INDICTMENT

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

ENTRY AMENDING INDICTMENT

This cause came on to be heard on the Motion of counsel for the State of Ohio to Amend the Indictment, and the Court, being fully advised in the premises, finds the Motion to be well taken.

IT IS THEREFORE ORDERED that the Specification to the Second Count of the Indictment is amended to read:

> "The Grand Jurors further find and specify that the offense in the second count of the indictment was committed while the said Willie Lee Bell and Samuel Hall were committing Kidnapping, in violation of Section 2905.01 of the Ohio Revised Code."

BILL OF PARTICULARS

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

BILL OF PARTICULARS

Now comes the State of Ohio through William P. Whalen, Jr., Assistant Prosecuting Attorney of Hamilton County, Ohio, and states the following:

On October 16, 1974, Willie Lee Bell individually, and in conjunction with Samuel Hall, did remove one Julius Graber from his residence at gun point. That Mr. Graber was forcibly taken to 1047 Groesbeck Avenue and there some of his possessions were removed from him and he was then shot and killed.

The State further contends that all events occurred in Hamilton County, State of Ohio.

/s/ Wm. P. Whalen, Jr.
Ass't. Prosecuting Attorney

JURY WAIVER

1-10-75

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

No. B-743172

STATE OF OHIO, PLAINTIFF

—*vs*—

WILLIE LEE BELL, DEFENDANT

JURY WAIVER AND APPLICATION FOR TRIAL BY THREE-JUDGE PANEL

Defendant, by and through his Court appointed counsel, respectfully advises this Court that he is effectively waiving his right to a trial by jury of his peers, by demanding that this Court try him by means of a three-judge panel.

Defendant understands that he has a constitutional right to a trial by a jury of 12 persons and that his demand for trial by a three-judge panel effectively waives his constitutional right to that jury trial.

/s/ Willie Bell
WILLIE LEE BELL

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.

/s/ Fred H. Hoefle
FRED H. HOEFLE

AFFIDAVIT OF COUNSEL

Fred H. Hoefle and Albert Mechley, Jr., being first duly cautioned and sworn, depose and say:

They are the Court appointed counsel for Willie Lee Bell, defendant in this matter, and have fully and completely advised him to the best of their ability of the various alternatives open to him in the defense of this matter, including his constitutional right to a trial by his peers or, in the alternative, the right to demand a trial by a three-judge panel.

After discussing the above alternatives at great length, providing the defendant with our recommendations, and giving the defendant approximately one week to think about his alternatives, defendant Willie Lee Bell has requested that we on his behalf proceed to demand a trial by a three-judge panel and thereby waive his right to a trial by jury.

/s/ Fred H. Hoefle
FRED H. HOEFLE

/s/ Albert Mechley, Jr.
ALBERT MECHLEY, JR.

Sworn to and signed in open court this 10th day of January, 1975.

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ENTRY WAIVING TRIAL BY JURY

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

ENTRY WAIVING TRIAL BY JURY

This matter came on for hearing upon the Motion of the defendant.

In open court the defendant, by written Motion, requests to exercise his right to waive a trial by jury and to be tried by a three judge panel.

The Court, after hearing from the defense attorneys and examining their affidavit, made an examination of the defendant.

It is the finding of the Court that the defendant understands the nature of his request and his constitutional right to a trial by jury, and therefore his Motion is hereby granted, and a three judge panel will be appointed.

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ENTRY FINDING DEFENDANT SANE FOR PURPOSE OF STANDING TRIAL

1-10-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

ENTRY FINDING DEFENDANT SANE FOR THE PURPOSE OF STANDING TRIAL

This cause came on for hearing upon the Order of this Court granting the defendant's Motion for a pre-trial psychiatric examination.

It is found that, in compliance with the Order, the defendant was examined by qualified, impartial psychiatrists, to-wit: Dr. Robert J. McDevitt, Dr. Elbert H. Seymour and Dr. Roy Whitman, and that the said psychiatrists have submitted a written report to this Court.

Upon consideration of the testimony of witnesses, the report which was put into evidence, and the arguments of counsel, the Court finds that the defendant is competent to stand trial, that the defendant can meaningfully assist his attorneys in his trial, and he understands the nature of the charges against him.

SENTENCE ENTRY 2-3-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B743172

THE STATE OF OHIO

—vs—

WILLIE LEE BELL

INDICTMENT FOR:

AGGRAVATED MURDER 2903.01 R.C.
AGGRAVATED ROBBERY 2911.01 R.C.
AND KIDNAPPING 2903.01 R.C.

[Entered Jan. 17, 1975]

COURT FINDING

This Cause came on to be heard, the Defendant, Willie Lee Bell having waived a trial by Jury, in writing, and was submitted to the panel of three (3) Judges, Hon. John W. Keefe, Hon. Thomas C. Nurre and Hon. William R. Matthews.

And the Court, having heard the evidence and arguments of Counsel, the Court's unanimous finding with respect to the plea of insanity is that the Defendant, Willie Lee Bell, is sane.

The Law of Ohio prohibits conviction on both of the two (2) counts of Aggravated Murder.

This Court finds unanimously, the Defendant, Willie Lee Bell, guilty of Aggravated Murder as charged in the Second Count of the Indictment; Guilty of Aggravated Robbery as charged in the Third Count of the Indictment,

and Guilty of Kidnapping as charged in the Fourth Count of the Indictment. This Court also finds, unaniously, the Defendant Guilty of the Specification to the Second Count in which it is specified that the Aggravated Murder was committed while the Defendant was committing Kidnapping in violation of Sec. 2905.01 of the Revised Code of Ohio.

A pre-sentence investigation is Ordered immediately and a psychiatric examination will be made of the Defendant.

A hearing in connection with sentencing will be held on Monday, February 3, 1975 at 9:30 A.M.

/s/ John W. Keefe
JUDGE JOHN W. KEEFE

/s/ Thomas C. Nurre
JUDGE THOMAS C. NURRE

/s/ William R. Matthews
JUDGE WILLIAM R. MATTHEWS

MOTION ATTACKING DEATH PENALTY

2-3-75

COURT OF COMMON PLEAS
CRIMINAL DIVISION
HAMILTON COUNTY, OHIO

No. B-743172

STATE OF OHIO, PLAINTIFF

—*vs*—

WILLIE LEE BELL, DEFENDANT

MOTION FOR AN ORDER DECLARING DEATH PENALTY UNCONSTITUTIONAL DISMISSING THE SPECIFICATIONS OF AGGRAVATING CIRCUMSTANCES FROM THE INDICTMENT, AND SENTENCING DEFENDANT TO LIFE IMPRISONMENT FOR HIS CONVICTION OF AGGRAVATED MURDER

Defendant, through counsel, respectfully moves this Court for an order declaring the provisions of the Ohio Revised Code providing for the death penalty under certain circumstances upon conviction of aggravated murder unconstitutional, dismissing the specifications of aggravating circumstances from the indictment and sentencing defendant to life imprisonment on the conviction of aggravated murder herein, for the reason that the death penalty is unconstitutional under the Eighth and Four-

teenth Amendments to the United States Constitution as cruel and unusual punishment, both by the nature of the penalty itself, and the arbitrary and capricious manner of its enforcement under the Revised Code.

ALBERT MECHLEY, JR. AND
H. FRED HOEFLE

/s/ H. Fred Hoefle
H. FRED HOEFLE
Attorneys for Defendant
400 Second National Building
Cincinnati, Ohio 45202
241-1268

[MEMORANDUM OMITTED IN PRINTING]

SENTENCE ENTRY

2-3-75

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION

No. B-743172

STATE OF OHIO, PLAINTIFF

v.

WILLIE LEE BELL, DEFENDANT

INDICTMENT FOR: AGGRAVATED MURDER 2903.01 R.C.; KIDNAPPING, 2905.01 R.C.; AGGRAVATED ROBBERY, 2911.01

The defendant, Willie Lee Bell, was present in open court with his counsel, H. Fred Hoefle and Albert Mechley, Jr., on the third day of February, 1975, having been previously found guilty of the offenses of Aggravated Murder, 2903.01 R.C., Kidnapping 2905.01 R.C., Aggravated Robbery, 2911.01 R.C., and the specifications to the second count of the indictment.

Pursuant to Sections 2929.03 and 2929.04 of the Ohio Revised Code, a hearing on mitigating circumstances prior to sentencing for a capital offense was held.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant, and to present any testimony and other evidence relevant to the penalty which should be imposed.

Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the Court, pursuant to division (D) of Section 2929.03 of the Ohio Revised Code, this panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section

2929.04 have been established by a preponderance of the evidence.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that the defendant, Willie Lee Bell, on the charge of Kidnapping be sentenced to the Ohio Penitentiary for a period of time not less than seven and not more than twenty-five years; on the Aggravated Robbery that he be sentenced to the Ohio Penitentiary for a period of time not less than seven years and not more than twenty-five years, to run consecutively; on the charge of Aggravated Murder, 2903.01 in specifications to the second count of the Indictment, be taken to the Jail of Hamilton County, at Cincinnati, Ohio, and within the next thirty (30) days be delivered by the Sheriff of Hamilton County, Ohio, to the Warden of the Ohio State Penitentiary, and that on the eighteenth day of July, 1975, the said Warden shall cause a current of electricity of sufficient intensity to cause death, to pass through the body of Willie Lee Bell, the application of such current to be continued until the said Willie Lee Bell is DEAD.

The defendant was notified of his right to appeal as required by Crim. R. 32(A)(2).

/s/ John W. Keefe
JOHN W. KEEFE
Judge

/s/ William R. Matthews
WILLIAM R. MATTHEWS
Judge

/s/ Thomas C. Nurre
THOMAS C. NURRE
Judge

ENTERED Feb. 3 1975

Image 45

2. *Court of Appeals Entries*:

JUDGMENT ENTRY

4-12-76

COURT OF APPEALS
FIRST APPELLATE DISTRICT
Hamilton County, Ohio

No. C 75068

STATE OF OHIO, APPELLEE

—*vs.*—

WILLIE LEE BELL, APPELLANT

JUDGMENT ENTRY

April 12, 1976

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Opinion filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Judgment with a copy of the Opinion attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellant, by his counsel, excepts.

To the Clerk:

Enter upon the docket of the court.

/s/ Shannon
Presiding Judge

ENTRY REINSTATING SENTENCE
4-23-76

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75068

STATE OF OHIO, APPELLEE

vs.

WILLIE LEE BELL, APPELLANT

ENTRY REINSTATING SENTENCE

This cause came on to be heard by the Court upon the appeal of the appellant, Willie Lee Bell, and the appellant having been heretofore sentenced which sentence was stayed pending the disposition of the within appeal, and

This Court having affirmed the judgment of the Common Pleas Court, Hamilton County, Ohio, on the 12th day of April, 1976;

This Court does hereby reinstate the sentence of the trial court, that the Warden of the Southern Ohio Correctional Facility, shall cause a current of electricity of sufficient intensity to cause death, to pass through the body of Willie Lee Bell, the application of such current to be continued until the said Willie Lee Bell is DEAD, said execution of sentence shall take place on the 27th day of August, 1976.

ORDER STAYING EXECUTION OF DEATH SENTENCE
4-27-76

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

No. C 75068

THE STATE OF OHIO, PLAINTIFF-APPELLEE

—*vs.*—

WILLIE LEE BELL, DEFENDANT-APPELLANT

ORDER STAYING EXECUTION OF DEATH SENTENCE

This cause came on for hearing on the motion of the defendant-appellant, Willie Lee Bell, for a stay of the execution of the sentence of death, heretofore rendered by the Court of Common Pleas, and affirmed by this Court, pending his appeal of the affirmance of his conviction and sentence to the Supreme Court of Ohio.

The Court finds that the motion is well taken and ought to be granted.

THEREFORE, IT IS ORDERED that the sentence of death herein imposed on defendant-appellant, Willie Lee Bell, IS HEREBY STAYED pending the disposition of his appeal in the Supreme Court of Ohio.

HAVE SEEN

/s/ Raymond E. Shannon
RAYMOND E. SHANNON
Presiding Judge

/s/ George H. Palmer
Judge

/s/ Robert R. Hastings, Jr.
Assistant Prosecuting Attorney
Attorney for the State

/s/ H. Fred Hoefle
For H. FRED HOEFLE and
THOMAS A. LUKEN
Attorneys for Defendant-appellant

3. *Ohio Supreme Court Entries*:

JUDGMENT ENTRY OF AFFIRMANCE

12-22-76

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO, 1976 TERM

City of Columbus. To wit: December 22, 1976

No. 76-499

THE STATE OF OHIO, APPELLEE

vs.

WILLIE LEE BELL, APPELLANT

APPEAL FROM THE COURT OF APPEALS
FOR HAMILTON COUNTY

This cause, here on appeal from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein and it appearing to the Court that the date heretofore fixed for the execution of the judgment and sentence of the Court of Common Pleas is now past, this Court proceeding as required by law does hereby fix the 22nd day of February, 1977, as the date for carrying said sentence into execution by the Superintendent of the Southern Ohio Correctional Facility, or in his absence by the Assistant Superintendent, in accordance with the statutes in such case made and provided.

It is further ordered that a certified copy of this entry and a warrant under the seal of this Court be duly certified to the Superintendent of the Southern Ohio Correc-

tional Facility and the Superintendent make due return thereof to the Clerk of the Court of Common Pleas of Hamilton County, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this —— day of ———————— 19—

———————————— Clerk

———————————— Deputy

MANDATE—12-22-76

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO, 1976 TERM

City of Columbus. To wit: December 22, 1976

No. 76-499

THE STATE OF OHIO, APPELLEE

vs.

WILLIE LEE BELL, APPELLANT

MANDATE

To the Honorable Common Pleas Court

Within and for the County of Hamilton, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

It is further ordered that the execution date be set for Tuesday, February 22, 1977.

THOMAS STARTZMAN
Clerk

————————19——

[RECORD OF COSTS OMITTED IN PRINTING]

No. 76-499

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, PLAINTIFF-APPELLEE

—*vs.*—

WILLIE LEE BELL, DEFENDANT-APPELLANT

Appeal from the Court of Appeals, First Appellate District, Hamilton County, Ohio

MOTION OF DEFENDANT-APPELLANT FOR REHEARING AND FOR A STAY OF EXECUTION

H. FRED HOEFLE and
THOMAS A. LUKEN

400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
1-513-241-1268

Counsel for Defendant-appellant

MOTIONS

Defendant-appellant, through his undersigned counsel, respectfully moves the Court for the following orders:

1. For a rehearing and additional oral argument, in accordance with and pursuant to Rule IX, § 1 of the Rules of this Court; and
2. For an order staying execution of the death sentence imposed herein by this Court on December 22, 1976, setting the date for execution of the sentence of death of February 22, 1977, pursuant to Rule IX, § 2; and 2949.24 R.C.
3. For an order staying the execution of the sentence of death until an appeal from the decision of this Court is filed and decided by the Supreme Court of the United States.

MEMORANDUM IN SUPPORT OF MOTIONS

In *State* v. *Bayless*, 48 Ohio St.2d 73 (11-24-76), this Court upheld the Ohio statutory scheme for implementation of the death penalty, deciding that the standards previously established by the Supreme Court of the United States in *Gregg* v. *Georgia*, —— US ——, 96 S.Ct. 2909 (1976) for constitutional implementation of the ultimate sanction were satisfied by the Ohio General Assembly in enacting §§ 2929.02-.04 R.C.

In *Gregg* v. *Georgia*, supra., the Supreme Court of the United States particularly described the features of the Georgia statute which were felt to eliminate the arbitrary and freakish imposition of the death penalty condemned in *Furman* v. *Georgia*, 408 US 238, 92 S.Ct. 2726:

> In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or *the character of the defendant.* Moreover to guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia *compares each death sentence* with

the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of *Furman*. 96 S.Ct. 2937 [Emphasis added].

. . . .

Under the procedures before the Court in that case [the *Furman* case, in which the procedures were found unconstitutional] sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the *character or record of the defendant* Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime *and the particularized characteristics of the individual defendant*. . . . No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. 96 S.C. 2941 [Emphasis added].

The Supreme Court of the United States thus indicated its belief that the death penalty may not be imposed constitutionally by a state unless that state's statutory scheme provides for [1] some consideration of the accused's prior record and character as a *meaningful* criteria, and [2] a case by case comparison by the State Supreme Court of all death sentences as an additional safeguard against the disproportionate imposition of the death sentence in a particular case.

We respectfully submit that *neither* of the criteria set forth in *Gregg* are satisfied by the Ohio procedures. While it is true, as this Court pointed out in its opinion herein, that the statute requires the sentencing court to consider "the history, character and condition of the offender," such consideration of the character and record of the accused does not have any determinative effect on whether the death penalty is imposed. § 2929.04(B)

The character and record of the defendant, which the Supreme Court of the United States has held *must* be

a determinative factor, has nothing whatsoever to do with establishing any of the three mitigating circumstances which must be established in order to avoid the ultimate punishment: character and record of the defendant cannot assist the court in determining whether the victim induced or facilitated the offense; nor can the character and record of the accused contribute much, if anything, to a determination of whether the accused was under duress, coercion, or strong provocation; finally, the character and record of the offender is not rationally connected to a determination of whether or not the offender's psychosis or mental deficiency was the primary cause of the offense.

Since the only method by which the offender may be spared is a determination of the sentencing court of one of the aforesaid "mitigating" factors, and since his character and record do not have any relationship to the determination of any of the statutory mitigating circumstances, the character and record of the defendant are not considered under Ohio law as affecting the decision of whether to impose the death sentence. The Ohio scheme does not, therefore, comport with the constitutional standards for the imposition of that penalty prescribed in *Gregg* v. *Georgia*, supra.

Further, the Ohio statutes and laws do not provide for review of each death sentence by the Ohio Supreme Court in comparison with the death sentences imposed in other cases, to avoid the freakish imposition of that sentence. To be sure, the Ohio Constitution provides an appeal as a matter of right in capital cases, but nothing in the Constitution or the Revised Code mandates the review of the sentence in each case in comparison with the appropriateness of the death sentence in other cases. In fact, in this case itself, there is no such comparison with the other cases under the new law in which the death sentence was upheld by this Court, e.g. *State* v. *Bayless*, 48 Ohio St.2d 73, *State* v. *Reaves* and *Woods*, 48 Ohio St.2d 127, *State v. Strodes*, 48 Ohio St.2d 113, and *State* v. *Roberts*, 48 Ohio St.2d ——, as well as in *State* v. *Hall*, 48 Ohio St.2d ——.

Ohio's statutory scheme thus fails to pass constitutional muster, and we urge the Court to grant the motion for rehearing, or, in the alternative, for a stay of the imposition and execution of the death sentence herein until appellant's appeal to the Supreme Court of the United States has been finally determined.

Respectfully submitted,

H. FRED HOEFLE, for
H. FRED HOEFLE AND
THOMAS A. LUKEN
Attorneys for
Defendant-appellant
400 Second National Building
830 Main Street
Cincinnati, Ohio 45202
1-513-241-1268

(Certificate of Service omitted in printing)

ENTRY DENYING REHEARING

(1-14-77)

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1977 TERM

City of Columbus. To wit: January 14, 1977

No. 76-499

STATE OF OHIO, APPELLEE,

vs.

WILLIE LEE BELL, APPELLANT.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the record of said Court, to wit, from Journal No. —— Page ——.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th day of January, 1977.

THOMAS L. STARTZMAN, Clerk.

By ———————— Deputy.

ENTRY STAYING EXECUTION

(1-14-77)

THE STATE OF OHIO, 1977 TERM

City of Columbus. To wit: January 14, 1977

THE STATE OF OHIO, APPELLEE,

vs.

WILLIE LEE BELL, APPELLANT.

ENTRY

(HAMILTON COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

/s/ C. William O'Niel
Chief Justice

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. —— Page ——.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 14th day of January, 1977.

THOMAS L. STARTZMAN, Clerk.

By [Illegible], Deputy.

B. Reports Submitted to the Trial Court

Pre-Trial Psychiatric Report

Filed 1-8-75

December 30, 1974

Judge John W. Keefe
Court of Common Pleas
Hamilton County Courthouse
Cincinnati, Ohio 45202

Re: Willie Lee Bell
B 743172

Dear Judge Keefe:

This sixteen year old black single male was examined in the Hamilton County Jail on December 26, 1974, by the undersigned. In addition after the examination, the undersigned had a conference in which they discussed their respective findings in regard to Mr. Bell. All information was taken from the defendant but the examination specifically addressed itself to:

1. his competency to stand trial
2. his ability to assist his attorney meaningfully in such a trial
3. whether he knew the nature of the charges against him

We also discussed at some length his mental state at the time of the commission of the offense. The following report is given.

When Mr. Bell was seen initially in the Hamilton County Jail, he was somewhat resistant at first to interviews. He cooperated well after we told him we were psychiatrists ordered by the Court to examine him.

He states that at first he was not present at all during the murder of Mr. Graber, but then admitted that he was in the car but denies any active involvement with Samuel Hall in the offense. He gives a fairly

detailed history of the meeting with Sam Hall that morning at the Community Center, going and picking up a car with him and the various movements in and out of Cincinnati involved in the next 24 hours.

He denies at any time implicitly threatening or attempting to harm the decedent. At first he denied any knowledge, but then gave a very detailed account.

He did admit having taken a table of "Mescaline Blue" which he claims was a downer and also smoking marijuana, however, his perceptions were not distorted and there was no evidence from his history that he was having hallucinations or any other drug effect.

Past history. He was born and raised in the Cincinnati area. His mother is thirty-nine years old, has a back injury and is on welfare. He has two brothers ages twelve and four that live in the home, two sisters ages eighteen and twenty-two. He has had little contact with his father. He claims that he has had some problems with school, was seen in the seventh grade by a psychiatrist from the Cincinnati Board of Education on a number of occasions. He claims the principal thought he was "crazy" but that he had good contacts with the psychiatrists. He has been at the McMillian Center for the past two years, but reluctantly admitted that he had not been at school for a month and half and he had been attempting to find a job.

When asked by the examiners what the worse thing was that ever happened to him in his life, he claimed it was an auto accident when he was seven or eight years old, but he was dazed and unconscious for a few days. The best thing he claims that ever happens to him is "when he gets high".

Mental status conducted by the examiners indicated that he was in contact with reality, his thought processes were clear, logical coherent. He did know the nature of the charge against him, but did not seem to understand the seriousness of the offense that he was being charged with. He shrugged his shoulders and said, "it's just a matter of life and death." There was, however, no delusions, hallucinations, or ideas of reference solicited. His intelligence appeared to be below average in

the vicinity of 90, and his thinking judgment tends to be in keeping with his intellectual ability. Fundamental information was quite good.

At the time of the offense he claims he was under the influence of a "blue mesc", and "weed", and these influenced some of his behavior. He claims that he was frightened that Mr. Hall would shoot him but he admits that he did nothing to intervene in the activities.

The examiners after carefully examining him and evaluating the history as given by him, find that:

1. He is in adequate contact with reality.
2. He knows the nature of the charge against him.
3. He is able to assist his attorney meaningfully in his defense.

In addition, the examiners note at the time of the commission of the offense he was under the influence of some drug, however, he gives a history of being able to drive a car from Cincinnati to Dayton, Ohio. He is also able to go through rather complex maneuvers and gives both the examiners considerable detail about his activities during the day. Certainly there is no evidence that he had a perceptual distortion from any of his history, although in the past he has taken hallucinogens and knows what they do. The only history suggested is a consultation with psychiatrists three years ago, presumably because of behavioral difficulties in school, but only outpatient therapy was attempted.

There is no other evidence present that this defendant is not competent to stand trial and there is no evidence presented by the defendant that this examination would indicate he was suffering from any mental disease at the time of the commission of the act. It is recommended that his particular case be judged on its legal merits and we will be glad to review the records from the Board of Education if this will be of any assistance to the Court or to the defendant.

Respectfully Submitted,

/s/ Robert J. McDevitt
ROBERT J. MCDEVITT, M.D.

/s/ Elbert H. Seymour
ELBERT H. SEYMOUR, M.D.

/s/ Roy M. Whitman
ROY M. WHITMAN, M.D.

POST-CONVICTION PSYCHIATRIC REPORT

Filed 1-30-75

January 23, 1975

Honorable John W. Keefe
Court of Common Pleas
Hamilton County Courthouse

Honorable William R. Matthews
Court of Common Pleas
Hamilton County Courthouse

Honorable Thomas C. Nurre
Court of Common Pleas
Hamilton County Courthouse

Re: Willie Lee Bell
B-743172

ENTRY APPOINTING PSYCHIATRISTS TO MAKE PSYCHIATRIC EXAMINATION FOLLOWING DEFENDANT'S CONVICTION OF AGGRAVATED MURDER

The undersigned have carefully examined Willie Lee Bell in the Hamilton County Jail on January 22, 1975 and January 23, 1975. Two of the examiners, Dr. Roy Whitman and Dr. Robert McDevitt examined him on January 22, 1975, and Dr. Elbert Seymour examined him on January 23, 1975. It should be noted by the Court that the examiners have also submitted a report on Willie Lee Bell on December 30, 1974, outlining some of the past history. The examination today specifically addressed the issues as outlined by the Revised Code of Ohio on these particular accounts.

As to the first question, there was no evidence presented by the defendant that Mr. Graber in any way precipitated or aggravated his murder. Mr. Bell stated that at no time did Mr. Graber offer any resistance, cause any provocation or say anything to either he or Sam Hall.

As far as the second charge, "it is likely that the defense would have been committed but the fact that the offender was under duress, coercion, or strong provocation". Willie Lee Bell states that he was not afraid of Sam Hall but he denied knowing what Sam Hall was up to. He claimed that he knew that Mr. Graber was placed in the trunk, he drove the car under Sam Hall's direction, backed into the spot at the cemetery. He claimed that he was not aware of what Sam Hall was doing at the time of the offense. He stated specifically that after he heard the shot," I was just thinking that he was doing it to scare him". I didn't know he shot the man." He stated that Sam Hall ran back down the hill and that he picked up another shell and went back after Mr. Graber. He claimed that at that time he felt that Mr. Graber had left. He said further that he did not attempt to leave or did not attempt to interfere with the shooting. In fact, he appeared to be relatively nonresponsive when we challenged him about the fact that he was able to ascertain at this time that the intention was to do harm to Mr. Graver, that he felt that there was any strength on his part to do anything about it.

In regard to the third charge of the Revised Code, "The offense was primarily the product of the offender psychosis or mental deficiency—insanity." On previous examinations, we have not found that the defendant was insane or not capable of understanding the charges against him. Examination today points out some facets not brought out by the previous examination. We were not able to ascertain any particular motivation on the part of the defendant in terms of committing this act. Previous concern had been the fact that he was sixteen years of age and was not capable of understanding the gravity of the situation. Examination today revealed that the individual is quite responsive, alert, to the questions of the examiners and claimed that he understood the possibility of being sentenced to the electric chair. He admitted to the examiners that he did not care to think about this possibility and that he "felt the same every day." That he adapted an attitude of stoicism and resignation as far as any sentence was concerned. He stated

further that he did not feel at any time that he had difficulties mentally. He was questioned very closely about his behavior at the time of the psychiatric consultation some years ago and he again confirmed that he felt it was the judgement of the principal that he was having mental problems, but did not feel in any way that he himself was having any problem. He admitted that he had taken up with Sam Hall because he admired his style and the fact that he had always hung around with older individuals. He was at a loss to explain to the examiners why he was particularly awed by older teenagers.

Direct mental status examination revealed again that his thinking was clear, coherent, and well organized. In addition today we found that he has a fairly good knowledge of chess and is considered the second best player in the jail. On standard psychological mental status testing, he scored an IQ score of about 110-120. Therefore the examiners are lead to believe that he has a better than average mental capacity for a youngster of age sixteen. Despite this above average IQ, his answers to the behavior in question seems to be slightly inappropriate.

When questioned about what his defense would be at present, he claimed that he felt very angry because no one would believe his story and preferred to believe the story of Sam Hill. He felt that by merely stating his story that he would be exonerated. He was unable to grasp the significance that by going along with Sam Hall and staying with him during the period of time that the offense occurred he had in fact agreed to and passively participated in the offense with Sam Hall. As before, he answers standard information on judgement with a fair degree of exactitude. The examiners are lead to believe after carefully examining him that he does not show a significant mental defect or mental deficiency to exonerate him from the responsibility for this particular act, except for his persistant inability to understand this facet of his case.

In summary, as best the examiners can ascertain at this stage, he claimed that he passively accompanied Sam Hall, stated that he did not perpetrate the shooting

but was in the car at the time that Mr. Graber was shot. He feels that he was not responsible because he was not physically present and did not fire the weapon. He cannot understand why he should be implicated merely because he was with him and does not understand this particular aspect of the law. Nonetheless, he seems to have better than average intelligence, adequate judgement and knows significant mental pathology which would have caused him to have participated in this activity without full and conscious consent. The examiners thus are lead to conclude that none of the above stated circumstances in the law are present as far as this offense is concerned.

Respectfully Submitted,

/s/ Robert J. McDevitt
ROBERT J. MCDEVITT, M.D.

/s/ Roy M. Whitman
ROY M. WHITMAN, M.D.

/s/ Elbert H. Seymour
ELBERT H. SEYMOUR, M.D.

Addendum to psychiatric evaluation report of January 23, 1975, reference to paragraphs two and three, page three.

The purpose of this addendum is to offer an explanation of the defendant's seeming lack of feeling and inability to see himself as an active participant in the offense of which he has been convicted. He sees himself as a passive participant in the crime that day and fully believed that his sense of responsibility and guilt was of a much reduced order of magnitude than Sam Hall's. This is reflected in his statement: "Sam told me to drive the car, so I drove the car," an act and a stance which he feels does not make him guilty of murder according to his own (and the law's) standards. His statement was given within this frame of reference i.e., that he was not really an active participant in the murder and therefore not guilty and others (including the judges) would see him according to his own standards of guilt. This also explains his strong disappointment that he was found guilty, seeing this decision as one where Sam Hall was believed rather than he. If he had been believed, he felt he would have been found innocent or guilty of a lesser charge. This way of avoiding active responsibility and personal guilt is akin to the mental mechanism of unconscious denial, by which he really sees himself as not responsible for the acts of that day and consequently has shown little feeling of responsibility for the act and felt a great deal of anxiety about the possible punishment. On the day I examined him (January 23, 1975) this mechanism of denial was beginning to become less effective. Although an immature way of handling the feelings around responsibility, and guilt, this explanation of the defendant's behavior does not constitute grounds for a diagnosis of psychosis mental deficiency or insanity. It is enclosed to hopefully aid the bench in its decision by attempting to explain the behavior of the defendant.

Respectfully Submitted,

/s/ Elbert Seymour
ELBERT SEYMOUR, M.D.

PRESENTENCE REPORT BY PROBATION DEPARTMENT
Filed 1-30-75

PRELIMINARY INVESTIGATION -CASE NO. 23889

WILLIE LEE BELL JR. —Age 17 Negro

Offense	—Aggravated Murder, Kidnapping —Robbery
Indictment Number	—B-743172
Arrests	—Seven
Date of Arrest	—10-23-74
Marital Status	—Single
Industrial History	—Negligible

JUDGES: JOHN W. KEEFE, THOMAS C. NURRE, WM. R. MATTHEWS

Prosc Attorney	—Claude Crowe William Whalen
Defense Attorney	—Albert Mechley Fred Hoefle

THERE ARE NO OTHER INDICTMENTS PENDING

(Co-defendant Samuel Hall)

ADULT PROBATION DEPT.
HAMILTON COUNTY

PRESENTENCE REPORT

PROBATION Form 2

CASE NO. 23889

JUDGES: JOHN W. KEEF
THOMAS C. NURRE, WM.
R. MATTHEWS

NAME
BELL: Willie Lee Jr.

DATE 1-30-75

ADDRESS
835 Poplar Street
Cincinnati, Ohio

DOCKET NO. B-743172

LEGAL RESIDENCE
Same

OFFENSE
Aggravated Murder,
Kidnapping & Robbery

AGE 17

PENALTY

DATE OF BIRTH 12-27-57

SEX M RACE Black

CITIZENSHIP U.S.

PLEA

EDUCATION 10th

VERDICT Guilty

MARITAL STATUS
Single

CUSTODY Remanded

DEPENDENTS Self

PROS. ATTY.
Claude Crowe

SOC. SEC. NO. 268-58-6660

DEFENSE COUNSEL
Albert Mechley
Fred Hoefle

FBI NO.
HSO #21079
FBI #665-764-N11
OSB #A-816-261

OSB NO.

DETAINERS OR CHARGES
PENDING:
None

CODEFENDANTS
(Disposition) Samuel Hall (Dell) JAR

DISPOSITION

DISPOSITION

DATE

SENTENCING JUDGE

PRELIMINARY INVESTIGATION

Indictment No. B-743172 Date Filed 1-17-75

Investigated by Dell Case No. 23889

Defendant BELL: Willie Lee Jr.

Aliases (Court Name) None Co-Defendants Sam Hall

Offense Aggravated Murder, Kidnapping & Robbery

Plea Trial X

Indicted for Same Date of Conviction 1-17-75

Date Report Submitted

Judge John W. Keefe, Thomas C. Nurre, Wm. R. Matthews

Disposition and Date

A. LEGAL HISTORY

Previous Court Record

DATE	OFFENSE	COURT	DISPOSITION
4-15-71	Housebreaking	Juvenile Court	$25 Fine & Costs Adjudicated Delinq.
7-10-72	Riding in Stolen Car	Juvenile Court	30 days House Arrest placed on Probation
10-18-72	Robbery	Juvenile Court	$25 Fine & Costs work detail for 5 Saturdays
12-3-72	Violation of an Order of Court	Juvenile Court	Dismissed
2-5-73	Auto Larceny	Juvenile Court	Court Costs Official Probation
5-23-73	Trespassing	Juvenile Court	$10 Fine & Costs restored to Probation
6-17-74	No Driver's License Illegal High Beam	Juvenile Traffic Court	$10 & Court Costs 6 months driving license suspension

THERE ARE NO OTHER INDICTMENTS PENDING

* * * *

OFFENSE & COLLATERAL INFORMATION THERETO

At approximately 11:00 P.M. on 10-16-74, Cincinnati Police Officers responded to an alert of "shots being fired" in the vicinity of 1046 Groesbeck Road in Winton Place. Shortly before that, a Mrs. Bertha Graber of the Parklane Apartments, 4201 Victory Parkway reported that her husband, Julius Graber, did not return to the foyer of their apartment building where she had been waiting while he parked their auto, a 1974 Chevrolet Malibu; furthermore, she indicated that prior to calling the Police she ascertained that the auto was not in its usual assigned parking place.

At the scene on Groesbeck Road where the shots were heard by occupants of a nearby apartment complex, Julius Graber, a 64 year old, male Caucasian was found by Investigating Police Officers lying face down in a wooded area a short distance from the highway at 1047 Groesbeck, the entrance of a rear access road to Spring Grove Cemetery. He was pronounced dead on arrival at Cincinnati General Hospital from gunshot wounds in the back of the head, face and hands. A subsequent autopsy confirmed that the cause of death was due to massive cranial hemorrhaging. His billfold was missing but other personal effects were found in his pockets undisturbed.

Subsequent investigation by Officers of the Homicide Squad of the Crime Bureau of the Cincinnati Police Department resulted in the apprehension of Willie Lee Bell Jr., a 16 year old, Black, male juvenile on 10-23-74; previously, his companion Samuel Hall, an 18 year old, Black male had been arrested by Dayton, Ohio, Police Department Officers on 10-17-74 in connection with an Abduction and Robbery offense in their community. In subsequent statements to the Cincinnati Police, both Hall and Bell admitted that they had abducted Graber from the Parklane Apartments parking area and after stealing his automobile, drove to the Groesbeck Road area where the offense occurred; however both Hall and Bell accused each other of actually firing the sawed-off shotgun, the

murder weapon at Graber. It was indicated that the second fatal shot struck decedent in the back of the head from extremely close range as he was kneeling or lying on the ground; the initial shot had wounded Graber in the hand and trunk.

After a hearing and psychiatric evaluation, Bell was bound over to the Grand Jury by the Hamilton County Juvenile Court which relinquished jurisdiction to the Court of Common Pleas.

Both Bell and Hall were indicted for Aggravated Murder, Kidnapping and Robbery (B-74312). Bell was tried before the Honorable Judges of the Hamilton County Court of Common Pleas: John W. Keefe, Thomas C. Nurre and William R. Matthews who found him Guilty as charged on 1-14-75 at which time a pre-sentence report and psychiatric evaluation were ordered under the appropriate sections of State of Ohio Revised Code, 2929.03.

Hall was tried by the Honorable Judges of the Hamilton Court of Common Pleas: Gilbert Bettman, Lyle W. Castle and Robert L. Black, Jr. who found him Guilty as charged on 1-21-75; they likewise complied with the appropriate sections of State of Ohio Revised Code, 2929.03 and ordered both a pre-sentence investigation and a psychiatric evaluation.

For the past 10 years, Julius Graber, the decedent, was Executive Director of the Glen Manor Nursing Home in Roselawn which was formerly known as the Reformed Jewish Home for the Aged. The auto involved in the Instant Offense was provided for Mr. Graber in his capacity as Director by the trustees of the nursing home who appointed Mr. Irvin Zimov after his demise as interim director. It is indicated that the Grabers were not of substantial means since the decedent continued to retain employment until his demise; however, payment of funeral expenses was available from a U.S. Treasury Note Mrs. Graber owned. Mrs. Graber suffered a stroke shortly after the occasion of her spouse's death and is presently being cared for by a married daughter who allegedly resides in New York; however, she will ultimately live in California with another daughter who is an

attorney. Trustees of the Glen Manor Nursing Home granted her a $200 per month pension for life in recognition of her deceased husband's years of devoted, competent service; in addition she will receive a Social Security allotment from the Federal Government which will comprise her total income.

Commander of the Homicide Division of the Cincinnati Police Department, Lieutenant Dan Cash, is of the opinion that the defendants should receive the maximum penalty provided for by law.

DEFENDANT'S VERSION OF THE OFFENSE

Bell's version of the offense centered around the fact that he and Hall had socialized at the Community Center in Roselawn on the day of the offense; allegedly they had been touring the area in a Pontiac automobile belonging to a relative of Hall's. At this time there had been conversation about obtaining a motor vehicle since neither had one of their own that was driveable. They left the White Castle Restaurant on the corner of Dana and Montgomery at approximately 9:30 P.M. and proceeded to the area of the Parklane Apartments on Victory Parkway where they followed the Graber auto to the parking lot which is contiguous to the building itself. According to Bell, Hall then removed a .20 gauge sawed-off shotgun from his coat after pulling up behind the Graber vehicle. Alighting from the Pontiac, he pushed the weapon into the window of the vehicle and ordered Graber out. After obtaining the keys from the ignition, the rear deck lid was opened and Graber was ordered to enter after remonstrating that his wife was waiting for him in the foyer. Bell denied any knowledge of the weapon or what Hall's intentions were and indicated that he was afraid not to comply with Hall's directions. The pair then returned to Hall's home where they left the borrowed vehicle which Hall had driven and drove to Groesbeck Road with Bell as the driver of the Graber vehicle. He insists that he followed the directions of Hall to the Groesbeck Road address and backed into the access road so that Graber could get out of the back of the

vehicle without being seen it was his opinion that Hall was going to release Graber at that point and take the car. However, according to Bell, Hall led Graber a short distance away into the woods at which time he heard a shot and a cry from the victim "Don't shoot me any more." Hall then allegedly returned to the vehicle and obtained another shell for the shotgun from the back of the vehicle and returned to the wounded victim at which time Bell heard a second shot. Hall then returned to the vehicle and ordered Bell to drive them to Dayton where they slept in the car.

The next morning, the pair entered a gasoline service station in the Dayton area at which time Hall left the vehicle armed with a loaded shotgun and ordered the attendant to get into the trunk compartment of the attendant's vehicle which was parked nearby. Bell related that he wanted nothing more to do with Hall at this point and decided to leave the area. He observed that the Dayton Police authorities had stopped the vehicle which Hall was driving which he had taken from the service station attendant. Bell then returned to the Cincinnati area and parked the Graber car on Beatrice Drive in a garage and returned to his home.

B. Analysis of Environment

CULTURAL & FAMILIAL BACKGROUND

The defendant is a native Cincinnatian and was reared primarily during his formative years in the Avondale and Madisonville areas with the exception of a 1½ year period when he resided with his grandfather in Philadelphia. He attended Rockdale and Columbia Elementary grade schools in the Avondale area with marginal achievement and repeated the 3rd grade; in Philadelphia he attended Chester Arthur Jr. High School for the 6th and 7th grades where he achieved in more adequate fashion. Also while in Philadelphia he received a certificate of accomplishment for swimming activities. When he returned to Cincinnati, he attended Lyon Junior High School during the 8th grade and was promoted to the

9th from which he was expelled during the school year for discliplinary reasons. In 1973, he re-entered school at the McMillan Center in Walnut Hills where he completed the 10th grade with poor to fair grades.

Due to a turbulent situation in the home setting, he was shunted from pillar to post and on occasion stayed with his grandmother on Burnet Avenue and with various relatives including his grandfather. Although he was considered dull normal in intellectual capability, school counselors felt that he could achieve at a higher level had the proper motivation existed in the home setting. The defendant relates that during his early youth, he belonged to the Boys' Club in the neighborhood and was quite active in athletic activities including baseball and the usual playground sports. He related that youths of his own age seldom interested him and that he usually socialized with older individuals in an endeavor to emulate their more sophisticated achievements. As a result of such activity, he was involved in insubordination with a group of older boys which resulted in his expulsion from Lyon School. He observed that during his early years of adolescence, constant economic deprivation existed and he obtained employment at the Riverfront Stadium and other part time jobs to obtain spending money. It is indicated that he basically enjoyed school work, but felt frustrated and neglected due to his lack of the material items his fellow students possessed. However, while in Philadelphia, his dependency needs were adequately met and his grandfather indoctrinated him in church attendance which apparently had a positive effect on his social functioning and attitude; however, when he returned to Cincinnati his previous problems including frustration in his social functioning made themselves felt resulting in his becoming aware of his lack of material possessions others enjoyed.

The defendant was the third in a sequence of five children born to Willie Lee Bell and Roberta (Tubbs) 43 and 40 year old natives of Lauderdale, Mississippi and Bessemer, Alabama respectively. The defendant's father was a habitual indulger of alcoholic beverages who primarily functioned economically as a cab driver

in very inadequate fashion; from 1962 to 1968 he was on probation to the Hamilton County Adult Probation Department for Failure to Provide; after he was discharged from probation, he left the family circle and has not been functioning actively with them since that time. His mother, worked for several years for the Frisch's Restaurant in Avondale and the Quality Inn Motel in Norwood, a Frisch's development where she sustained a back injury several years ago for which she receives a disability pension. She began associating about 6 years ago with Joseph Sanford, a 35 year old native of Cincinnati, Ohio, who is employed at the Queen City Barrel Company. School records indicate that the home environment never provided the proper motivation or appropriate setting for the children to normally achieve. Kenneth and Robert, the defendant's 15 and 14 year old brothers respectively reside with Joseph Sanford and their mother at 835 Poplar Street in downtown Cincinnati. Formerly the family resided at 1025 Burton Avenue in Avondale where $125 monthly rental was paid for a 5 room suite maintained in average fashion. Prior to that time they lived at 334 Forest Avenue and at 5422 Shelborne Road in Madisonville. Agency records indicated that the home usually displayed a fair degree of maintenance but offered a minimal reservoir of emotional strengths or resources from which the offspring might profit.

The defendant's 19 year old sister, Annette Bell resides alone at 402 Catherine Street and is sustained through the Hamilton County Welfare Department on an A.D.C. allotment for her illegitimate child. His oldest sister, Evelyn, 23 years of age, also resides in the Avondale area and is likewise sustained by A.D.C. as the mother of three offspring. The defendant's brothers and sisters are know to the Juvenile Court of Hamilton County and it is quite evident that the home situation did not provide adequate emotional strengths and an appropriate behavior model for the offspring. Both sisters are presently on probation to the Hamilton County Adult Probation Department for check charges.

The defendant's grandparents reside at 2024 Burnet Avenue and have apparently provided the most positive

impact on the defendant's personality and emotional development during his formative years; when he resided with them he allegedly attended church regularly and functioned in a proper disciplinary climate. Throughout his early youth and adolescence they were very interested in his welfare and related that they are unable to understand his present criminal involvement and predicament.

The defendant relates that he fathered a child by Janet Parks, a 19 year old individual who is a native of Cincinnati; however, he does not know her present whereabouts. At the time of the offense he was keeping company with an 18 year old Black, Ida Poellnietz, who resides at 129 West Nixon Street; she visits him as often as she is able to do so.

ECONOMIC & MILITARY ADJUSTMENT

Due to the defendant's youth, his industrial history is negligible. For a brief period of time he allegedly was employed at Coleman's Bowling Alley in a clean-up capacity and earned approximately $25 per week. While his mother worked at the Quality Inn Motel in Norwood, the defendant was allegedly employed as a part time dishwasher at Frisch's Restaurant on Reading Road but no records were kept as to his adjustment. Personnel officials relate, however, that part time help is often hired without a record being kept, however the proprietor was unable to confirm the situation. During the summer, he was employed at Riverfront Stadium as a vendor. Overall, his industrial history is considered limited due chiefly to his youth and inexperience.

Willie avers that he wanted to enter Military Service when he became old enough and since early adolescence has been interested in a Military career.

C. The Individual

PHYSICAL & MENTAL

Willie Lee Bell Jr. is a 17 year old, Black male who was born on December 27, 1957; he weighs approxi-

mately 140 pounds at his height of 5'7" and presents a small boned, but wiry physical appearance. He experienced the normal childhood diseases but at the present time apparently has no limiting physical disabilities. He relates that several years ago he was struck by an automobile at which time he received a head injury but there are no apparent complications.

While a student, Bell was referred for a psychological evaluation and on the Weschler Intelligence Scale for Children received a verbal I.Q. of 85 and a performance I.Q. of 80 with a full score average of 81 which indicated low average or dull normal intellectual capability. His abstract reasoning and concentration capability were rated average but general information, reservoir of comprehension and vocabulary were rated low. While in the 8th grade, he was found to be functioning in regard to arithmetic problems at the 6th grade level and on the wide range achievement test was functioning on approximately the same level of capability. During the 6th and 7th grades he achieved nearly a low "B" average in spite of significant absenteeism but during the 8th grade was absent 59 days and received "D" 's and "F" 's in all subjects; according to school records his low achievement was due chiefly to poor motivation and not lack of innate ability.

His personality evaluation was rated inadequate in areas of judgement, social awareness, and self-control with a low frustration tolerance and a low degree of maturity towards acceptance of responsibilities. As indicated on the Wechsler Intelligence Scale for Children, the wide variation in his scores indicated emotional instability; however, other criteria indicated that he probably had a higher true potential for learning than his previous scores indicated. Further evaluation indicated that his emotional and academic problems needed to be overcome before he would be capable of achieving at a higher level. It is also indicated that the defendant appeared quite rejected in his functioning and interpersonal relationships. Allegedly he attempted to deal with others through fantasy and withdrawal thereby becoming inaccessible to others. According to reports, he equates

strength and power with being masculine and much of his resentment is caused by his dependency needs being unfulfilled.

School records indicate that Bell displayed an acute need of positive relationships during his formative years and emotional strengths which might have been obtained through an older person were not forthcoming.

CHARACTER & CONDUCT

During 1971, 1972 and 1973 Bell was cited to Juvenile Court on seven occasions for offenses including Housebreaking, Riding in a Stolen Car, Violation of a Court Order, Robbery, Auto Larceny, Trespassing and No Driver's License for which he received at various times probation, house arrest, or a fine without perceivable alteration of his behavior pattern. Although he profitted to some extent by the personality conditioning received with his grandfather and other relatives, there were minimal emotional strengths in the parental home from which the defendant could profit with the result that the majority of his character formation sprung from the environment of the street where he futilely strived to fulfill the dependency needs he so desperately required. School records in the past dramatically pointed out the direction in which Willie's behavior was pointing and quite accurately predicted his downfall to social oblivion. Positive interpersonal relationships were urgently indicated but were not obtained as agencies and his family did not follow through with recommendations from the school. As a result, Willie sought peer recognition from the streets and delinquent older associates which merely catapulted him headlong into antisocial activities. He relates that during the past two year period, he had been experimenting with Marijuana and L.S.D.; in fact on the night of the offense he had allegedly been using Mescaline, a hallucinogen. He further relates that he is not impressed with alcoholic beverages but on occasion has gotten drunk on beer or wine. He enjoys shooting dice occasionally or playing cards with peers but apparently

has no compulsion in the gambling area. His sexual expression has been characteristically normal with no apparent aberration of psychosexual responses. He is quite talented musically and relates that he can play nearly all instruments by ear which has been confirmed by members of his family. He particularly enjoys playing the piano and it is indicated that he is quite accomplished on this instrument. In addition, from a vocational point of view, he allegedly enjoys reading, interestly enough, and all outdoor sports particularly swimming. He is of the Protestant religious persuasion and is a baptized member of the Church of the Lord Jesus Christ located at Reading Road and Washington Avenue under the pastorate of Bishop McDowell. He attends services occasionally but really became interested in religious activities while in Philadelphia living with his grandfather who insisted on church attendance two or three times per week.

Regarding his present involvement, it is not beyond the realm of possibility that Bell overidentified with the co-defendant, an older, more sophisticated individual to his detriment. There seems to be minimal hostile behavior in the defendant's background and a desire for peer acceptance may have provided the backdrop and caused his exploitation by others with more habitual criminal attributes. Summarily, there is no doubt that Willie Lee Bell Jr. possessed the intellectual capability to normally achieve and become a responsible citizen; however, his lack of emotional stamina and positive personality attributes which possibly could have been supplied by a strong, positively orientated personality were not forthcoming with the result that the defendant followed the path of least resistance to ignominy and his present role as pariah of society.

Respectfully submitted,

APPROVED:

/s/ Ernest H. Taylor
ERNEST H. TAYLOR,
Chief Probation Officer

/s/ William C. Dell
WILLIAM C. DELL,
Assistant Chief
Probation Officer

C. EXCERPTS FROM THE PROCEEDINGS IN THE TRIAL COURT

PROCEEDINS RE JURY WAIVER I [R. 5-8]

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[5] (MR. MECHLEY: * * *) our client has informed us this morning—pursuant to some lengthy discussions with him over the past week, week and a half—that he wishes to withdraw his request for a jury and to proceed in this matter with a three-judge panel. I realize that has to be done in writing and we intended to do that but, again in keeping with the tenor of what the court has asked of us, we wish to advise the court as quickly as we knew, which was less than a half hour ago.

THE COURT: Have him come up here, Mr. Mechley.

MR. MECHLEY: Sure.

THE COURT: Mr. Whalen, I want you and Mr. Crowe up here, too.

MR. WHALEN: Yes. I'm sorry, your Honor.

THE COURT: Now, this presents, you know, an unforeseen situation here, in view of the fact that some 75 or 80 veniremen have been summoned. I am wondering if, before we examine him on that, you ought not to have the request executed in writing.

MR. MECHLEY: Fine.

THE COURT: That is what I think is the right way to do it.

MR. MECHLEY: I agree. I would suggest that.

THE COURT: It is right that you mention it, but I want to examine him to be sure.

[6] Mr. Bell, is this what you want to do?

DEFENDANT BELL: Yes, sir.

THE COURT: You understand that once you waive your right to trial by jury and you ask for three judges and you execute that waiver in writing and you do it intelligently, knowing what you are doing, then you cannot change your mind again. Do you understand that?

DEFENDANT BELL: Yes, sir.

THE COURT: And, Mr. Mechley, you and Mr. Hoefle understand that, too, that there cannot be any—

once he makes a waiver that the court considers a voluntary and effective waiver, then he cannot change his mind?

MR. MECHLEY: While one could debate that academically forever, that is not our intention. We discussed that with the client. While I can't agree with the court on a technicality, I have to respond I can't agree, but that is not the point.

For the record we discussed everything from preliminaries to investigation to trial to sentencing as it pertains to a jury, three judges, and one judge, which I don't think is even possible, and we have told this to our client. We have discussed it at great length—it was two or three hours up in the jail, at least on one occasion—and we asked him to reserve judgment until such time as he was satisfied that he had come to a com-
[7] plete decision. He did that and this morning he advised me and Mr. Hoefle, pursuant to our request and his voluntarily doing so, that he wanted to proceed with a three-judge panel. I am convinced he knows the alternatives to all this. I know I and Mr. Hoefle do. And for that reason I wanted to advise the court of this as soon as I had the decision.

THE COURT: Are the things that Mr. Mechley has just said to me in your presence all accurate?

DEFENDANT BELL: Yes, sir.

THE COURT: All correct?

DEFENDANT BELL: Yes, sir.

THE COURT: Well, the subject of a change of choice is academic, and I hope that it remains that way, but isn't the state's position the same as the court's, that once there is an effective waiver that you cannot come back and have a jury? I think that would be a travesty.

MR. WHALEN: Could we take a short recess and discuss this in chambers? I don't want to belabor the point, but—

THE COURT: I don't—

MR. MECHLEY: In response to that, I don't know if it is a good idea. If you want to discuss some general outline of something, fine, but I think as far as the record is concerned, if we are talking about anything

[8] pertinent to this man's request, which he has every right to make, that should be done on the record.

THE COURT: There has been no attempt to deny that.

MR. WHALEN: I don't deny he has a right to make that request at all.

THE COURT: We don't deny that. But the thing is, I want to obviate any possibility of an alteration of attitude, you see.

MR. MECHLEY: Your Honor, I think the court has the obligation—when we file this withdrawal—waiver of jury trial form—and I am sure the court knows this, since he has already mentioned this—to obstensibly interrogate the defendant as to whether or not that is his voluntary and intentional desire and whether or not he has conferred with us. We have already done some of that.

THE COURT: The record already reflects that and the court will do it again at the time you file your request in writing.

Now, I think that the orderly procedure, anyway, before that is done, is a determination on the sanity, so there is no question about the validity of that choice.

MR. MECHLEY: That was the other thing that was confronting us, your Honor.

THE COURT: All right. O.K. Now, we are ready to go on the sanity situation. . . .

* * * *

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[53] THE COURT: Counsel for the defendant earlier indicated to this court the defendant wants to waive his right to trial by jury and have these charges tried by a tribunal of three judges.

Now, has that manifestation of intention been reduced to writing, gentlemen?

MR. HOEFLE: Yes, your Honor.

THE COURT: Will you present it, please.

MR. MECHLEY: May it please the court, for the record we are presenting the court with a jury waiver and [54] application for trial by a three-judge panel, which I believe is self-explanatory—as the first aspect.

The second aspect is an affidavit of counsel, which, while the document speaks for itself, for the purpose of enacting that affidavit, I would like to read it to the court in front of the court, and I and Mr. Hoefle sign it in the presence of the court and our client.

It reads as, "Fred H. Hoefle and Albert Mechley, Jr., being first duly cautioned and sworn, depose and say:

"They are the court-appointed counsel for Willie Lee Bell, defendant in this matter, and have fully and completely advised him to the best of their ability of the various alternatives open to him in the defense of this matter, including his constitutional right to a trial by jury, by his peers"—I am sorry—"or, in the alternative, the right to demand a jury trial by a three-judge panel.

"After discussing the above alternatives at great length, providing the defendant with our recommendations, and giving the defendant approximately one week to think about his alternatives, defendant Wille Lee Bell has requested that we on his behalf proceed to demand a trial by a three-judge panel and thereby waive his right to a trial by jury.

"Signed Fred H. Hoefle, Albert Mechley, Jr., sworn to and signed in open day of court, this 10th day of January 1975."

[55] MR. HOEFLE: I am signing this H. Fred Hoefle, which is correct, as opposed to the typing on that.

MR. MECHLEY: I'm sorry, H. Fred.

MR. HOEFLE: That's all right.

THE COURT: Now, you call it an affidavit, which doesn't concern the court. Of course, there is no oath on it.

MR. MECHLEY: Well, there is, your Honor, at the top, and I think the effect of what we just did in open court performs that.

THE COURT: All right. The court is not finding fault with it. O.K.

Now, Mr. Willie Lee Bell, did you hear what Mr. Mechley and Mr. Hoefle just said?

DEFENDANT BELL: Yes, sir.

THE COURT: They have represented to the court, in your presence, that they fully and completely advised you, to the best of their ability, to the various alternatives open to you in the defense of this matter? Is that right? Have they discussed this with you at length?

DEFENDANT BELL: Yes, sir.

THE COURT: And you understand that you have a right to a trial by jury if you want it? Do you understand that?

DEFENDANT BELL: Yes, sir.

[56] THE COURT: And it is your free and voluntary choice and made in light of knowing what you are doing, that you want three judges to try the case instead of a jury trying your guilt or innocence. Is that right?

DEFENDANT BELL: Yes, sir.

THE COURT: You understand the penalty does not change and that you still have a possibility of being sentenced to the electric chair, whether it is three judges or whether it is a jury? Do you understand that?

DEFENDANT BELL: Yes, sir.

THE COURT: And this is still your decision, you waive your right to trial by jury?

DEFENDANT BELL: Yes, sir.

THE COURT: Let's see what he says here. "Defendant, by and through his court-appointed counsel, respectfully advises this court that he is effectively waiving

his right to a trial by jury of his peers, by demanding that this court try him by means of a three-judge panel.

"Defendant understands that he has a constitutional right to a trial by jury of twelve persons and that his demand for trial by a three-judge panel effectively waives his constitutional right to that jury trial."

Is that your signature on there, Willie?

DEFENDANT BELL: Yes, sir.

THE COURT: Did you sign that voluntarily?

[57] DEFENDANT BELL: Yes, sir.

THE COURT: All right. I think it is covered. Is there anything you want to ask him?

MR. WHALEN: The state is satisfied, your Honor.

THE COURT: Mr. Mechley?

MR. MECHLEY: Yes. In order to get you to sign this, did I promise you anything? Did I tell you that for certain, as a result of signing this, anything would happen, except that you would get a three-judge panel?

DEFENDANT BELL: No, sir.

MR. MECHLEY: Did Mr. Hoefle promise you anything?

DEFENDANT BELL: No, sir.

MR. MECHLEY: God help us, did the prosecutor promise you anything?

DEFENDANT BELL: No, sir.

MR. MECHLEY: Thank you.

THE COURT: All right. I don't think the court has to indicate anything on the waiver other than it just be filed.

MR. WHALEN: I will draw and present the entry, your Honor.

THE COURT: Present the entry which will recite that the court accepts the waiver.

MR. WHALEN: That and the court made the inquiry and is satisfied.

[58] THE COURT: I would like to have that entry—can I have it this afternoon?

MR. MECHLEY: My point, I thought it was done in open court.

THE COURT: Yes. There also ought to be an entry prepared for the signature of the presiding judge, Judge Morrissey, appointing two other judges.

MR. WHALEN: I will bring that up, also.

THE COURT: I know that counsel would be interested and curious to know who the other two judges are. The choice is in the hands of Judge Morrissey. I want to be forthright with you and tell you that I do believe one of them will be Judge William R. Matthews. I cannot tell you who the other one will be.

We will be together, then, Tuesday morning at 9:30, at which time I will hear the motion to suppress, following which—whether it is granted or overruled, I assume—following which, the trial will start by three judges.

O.K. I want those two entries today—at least those two entries this afternoon.

We will be adjourned.

(The case was continued until Tuesday, January 14, 1975, at 9:30 a.m.)

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[491] MORNING SESSION, MONDAY, FEBRUARY 3, 1975

JUDGE KEEFE: State of Ohio versus Willie Lee Bell.

MR. HOEFLE: For the defendant, your Honor.

MR. WHALEN: For the state, your Honor.

JUDGE KEEFE: Now, this court several weeks ago unanimously found the defendant, Willie Lee Bell, guilty of aggravated murder as charged in the second count of the indictment; guilty of aggravated robbery as charged in the third count; and guilty of kidnapping as charged in the fourth count. The court unanimously also found the defendant guilty of the specification to the second count.

Now, the law of Ohio, as we all know, provides that when death may be imposed as a penalty, the court shall require a pre-sentence investigation and a psychiatric examination to be made. And the court must require that these reports be submitted to it.

This court has directed such a pre-sentence investigation and a psychiatric examination and now the court wants to inquire of the state if it received the copies of the psychiatric examination and of the pre-sentence investigation.

MR. WHALEN: We have, your Honor.

JUDGE KEEFE: Now, Mr. Mechley and Mr. Hoefle, the court would like to ask you and your client if copies of the psychiatric examination and the pre-sentence investi- [492] gation were received by you lawyers and by the defendant.

MR. HOEFLE: We have, your Honor. I don't know —Willie, have you received copies?

DEFENDANT BELL: Yeah.

MR. MECHLEY: We have, your Honor.

MR. HOEFLE: We have, your Honor.

JUDGE KEEFE: Let the record show the defendant indicated from his seat at the table that he also received a copy.

Now, the court is willing to hear testimony and other evidence and a statement, if any, of the defendant and arguments, if any, of the lawyers, and the defense and the state relative to the subject of the penalty which should be imposed on the offender with respect to the conviction of aggravated murder.

This court reminds defense counsel and the defendant that the defendant, if the defendant chooses to make a statement, is subject to cross-examination only if he consents to make such statement under oath or affirmation.

Now, my colleagues and I are aware of the fact that there has been filed by counsel for the defendant which is designated, "Motion for an Order Declaring Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of [493] Aggravated Murder."

Now, the court would like to suggest to the defense that, in view of the fact that the psychiatrists have been subpoenaed to be here 45 minutes before the time the court was to convene on this case, and have now been in the courtroom about an hour, and because they all have busy professional schedules—this court would like to ask the defense if it is agreeable to developing whatever testimony is to be developed from the psychiatrists, both by the state and by the defense, and then excuse them, and then the court will afford a reasonable opportunity to the state and defendant to argue this motion which was filed this morning.

Is the defense agreeable?

MR. MECHLEY: Very agreeable, your Honor.

JUDGE KEEFE: All right, Mr. Mechley and Mr. Hoefle. What do you want to bring to our attention now?

MR. MECHLEY: Your Honor, in light of what the court has just suggested, I intended to make a few brief opening remarks.

JUDGE KEEFE: That is O.K.

MR. MECHLEY: But I would like at this time to say that we have no intention of calling the three psychiatrists.

JUDGE MATTHEWS: You have no intention of calling them?

[494] MR. MECHLEY: No intention.

JUDGE KEEFE: Does the state have any intention of calling them?

MR. WHALEN: We do, your Honor.

JUDGE KEEFE: Now, the defense at this posture is standing on the written report, which Doctor Whitman and Doctor McDevitt and Doctor Seymour filed?

MR. MECHLEY: No, your Honor. We have no intention of calling the psychiatrists. We aren't standing on anything.

JUDGE KEEFE: All right. But you have received—as you indicated previously, you have received the report and have had an opportunity to read it?

MR. MECHLEY: Yes, sir.

JUDGE MATTHEWS: The burden is upon the defendant to prove by a preponderance of the evidence one of the mitigating circumstances.

JUDGE KEEFE: O.K.

JUDGE MATTHEWS: And the defendant goes first.

MR. MECHLEY: We were just trying to go along with what the court suggested concerning the time of the psychiatrists. We would have no problem whatsoever if the court felt, in deference to the psychiatrists, if the prosecution wishes to call them at this time.

JUDGE KEEFE: Doctor McDevitt, Doctor Seymour, and [495] Doctor Whitman, the court is not unmindful of the busy professional schedule which you three gentlemen undoubtedly have. However, we would like to have you remain available at least for the next half hour or so, and then we will re-examine the posture of the developments at that time. So that we ask that you preferably remain in the courtroom, if you would.

All right. Mr. Mechley and Mr. Hoefle, will you proceed, please.

MR. MECHLEY: Thank you, your Honor.

MR. HOEFLE: Is this on the motion or the—if I may ask, what is our procedure? The motion first?

MR. MECHLEY: No; they want us to reserve that.

JUDGE MATTHEWS: Reserve the argument on the motion until after we have heard what we are going to hear on the mitigation.

MR. HOEFLE: Fine. Thank you, your Honor.

MR. MECHLEY: May it please the court, Mr. Prosecutor, Mr. Hoefle, Willie.

Your Honor, very briefly, we intend to demonstrate to the court a portion of Mr. Bell's background, Defendant Bell's background, in terms of his family, the fact that he lived with his mother during the majority of his life—certainly through the important years of puberty, absent a father, who left when he was approximately three years of [496] age.

As you are already aware, the defendant was born on December 27, 1957, which makes him 16 years old as of the date of the alleged offense; 17 years old at this time.

We hope to bring three teachers before this court, teachers who have known and been involved with Willie Bell, concerning his educative background and concerning further—in addition to the report that has already been submitted by Mr. William Dell of the probation department at the request of this court—his involvement with drugs, including glue, marijuana, pills, Mescaline pills, and other forms of speed and LSD.

We intend to demonstrate to the court that, as concerns the particular act with which he is charged, he had absolutely nothing to do in terms of active participation with that act; that he was strictly a passive participant in that act; and that the co-defendant in that particular case, in fact, admitted that he himself had killed Julius Graber, on at least two occasions, to police subsequent to that murder with which he is charged.

Thank you, your Honor.

MR. WHALEN: Your Honor, the state has no opening statement.

MR. HOEFLE: Your Honor, our first witness will be Roberta Bell.

[497] ROBERTA BELL

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q. Will you give us your name and address, please?
A. Roberta Bell, 835 Poplar.
Q. What is the address again?
A. 835 Poplar.
Q. Are you related to the defendant, Willie Lee Bell?
A. That's my son.
Q. You are his natural mother?
A. Right.
Q. What day was Willie born?
A. December 27, 1957.
Q. And who is Willie's father?
A. Willie Lee Bell, Sr.
Q. And does William Lee Bell, Sr., live with you at the present time?
A. No.
Q. I see. How long has it been since you and he have lived as husband and wife?
A. I left in '61. He ain't been with me since.
JUDGE KEEFE: Just a minute, Mr. Hoefle.
Mr. Harris, if you can, move the lady up forward to that PA a little bit.
[498] All right. I'm sorry. You may proceed.
MR. HOEFLE: I have no further questions.
MR. WHALEN: No questions, your Honor.
JUDGE KEEFE: All right. You may step down.

(Witness excused.)

MR. HOEFLE: Your Honor, we would call the defendant to make an unsworn statement. We would appreciate the court's permission to do it in a question-

and-answer format to save time and make it more—give it more continuity.
JUDGE KEEFE: Just a minute, please.
All right, Mr. Hoefle. You may do it that way.

WILLIE LEE BELL

gave the following unsworn statement:

EXAMINATION

BY MR. HOEFLE:

Q. O.K., Willie. Speak up so everybody can hear you, please.
Could you give us your full name?
A. Willie Lee Bell.
Q. I see. Where did you reside before you were arrested?
A. 1025 Burton.
Q. Where is that?
A. In Avondale.
Q. Cincinnati?
A. Yes, sir.
[499] Q. I see. Since you were arrested you have been up in jail; is that corrct?
A. Yes, sir.
Q. Now, what was your birth date?
A. December 27.
Q. What year?
A. Fifty-seven.
Q. And where did you live before you—or with whom did you live before you were arrested on Burton Street.
A. My mother.
Q. Was there anybody else in the family that was living with you?
A. My two little brothers and my sister.
Q. Has you father lived with the family?
A. He has.

Q. I see. When was the last time, to the best of your recollection?

A. Oh, I don't know about ten years—seemed to me like that long.

Q. Now, did you go to school in Cincinnati?

A. Yes, sir.

Q. What schools did you attend?

A. Rockdale, Columbian, Ach, Schiel, Lyon, McMillan.

Q Is McMillan the last school that you attended?

A. Yes, sir.

[500] Q. Where is that?

A. It's in Walnut Hills.

Q. Now Willie, in the past have you ever sniffed glue or been involved with drugs?

A. Yes, sir.

Q. And what was the first occasion? When was the first occasion that you either sniffed glue or got involved with drugs?

A. About three years ago.

Q. And what kind of—what did you use?

A. I started sniffing glue first.

Q. O. K. And how long did you sniff glue?

A. About a year.

Q. How frequently?

A. Every day.

Q. Every day?

A. Yeah.

Q. What kind of glue was this?

A. Model glue.

Q. What affect did it have on you?

A. It took me places, you know.

Q. What do you mean by that? Did it make you high?

A. Yes, sir.

Q. Did it make you feel better than you did before you sniffed it or worse?

[510] A. Yes, sir, better.

Q. Is that why you sniffed it?

A. Yes, sir.

Q. And when did you stop sniffing glue? You said it's been about a year?

A. Yeah. I sniffed glue about a year.

Q. Why did you stop sniffing glue?

A. I got tired of it.

Q. Did you go off of drugs or glue altogether at that point or did you—

A. No, sir.

Q. What did you do?

A. Started smoking marijuana.

Q. Anything else? Any other drugs?

A. Then after I was smoking marijuana for awhile I changed to pills.

Q. When you were on the pills did you continue to smoke marijuana?

A. Yes, sir.

Q. And why did you do that?

A. Well, if you combine both of them it's better than just one.

Q. I see. Now, you are talking about pills. Do you know what kind of pills these were?

A. Reds, OP's, Mescaline.

[502] Q. What is a Red? What does it do to you?

A. It's a down.

Q. Down?

A. Yes, sir.

Q. How does a down make you feel?

A. Relaxed.

Q. How relaxed? Do you fall asleep with them?

A. You can.

Q. You never took that many? Or did you?

A. I never did.

Q. Did you ever take enough to put you out?

A. No, sir.

Q. And you talk about OP's. What kind of pills are those?

A. They diet pills.

Q. Are those downs or ups?
A. They ups.
Q. How do they make you feel?
A. More into things, you know.
Q. Were you more or less excitable after you would take an up or an OP?
A. More.
Q. Any other drugs? I think you said Mescaline. What does that do?
A. That's a down.
[503] Q. And that has the same effect that you said the Reds have; is that correct?
A. That's correct.
Q. In fact it was Mescaline you took the night Mr. Graber was killed?
A. Yes, sir.
Q. Now, how long a period did you continue taking these pills and smoking marijuana after you started them —after you stopped sniffing glue?
A. To the day I was arrested.
Q. O. K. How frequently did you take these drugs?
A. Every day.
Q. Every day?
A. Yeah.
Q. So that it is your statement, then, that with either glue or pills or marijuana you were under the influence of some drug virtually every day for the last three years?
A. Yes, sir.
Q. Where would you get these drugs?
A. From school, on the streets, at the center.
Q. At the center, you said? What center?
A. Hirsch.
Q. Where is that?
A. In Avondale, on Reading Road.
Q. What kind of center is that?
[504] A. It's a community center.

Q. Is that where you first met Sam Hall the night Mr. Graber was killed?
A. It that my first—
Q. Is that the same center?
A. Yes, sir.
Q. You mentioned OP's and Reds and Mescaline. Were there any other drugs that you can think of that you have taken?
A. Acid.
Q. What does that do?
A. It's up—but it's more—you get more out of it than you do OP's. It's like an OP.
Q. And you also said you obtained these drugs and things in school. What school?
A. McMillan.
Q. At McMillan. From whom did you obtain them?
A. From some students.
Q. Were there any people that were not students at the school that were pushing drugs?
A. Yes, sir.
Q. And at the center who did you get them from?
A. Friends.
Q. And I think you also said on the street. Was there any particular place on the streets where you could get drugs?
A. Yes, sir.
[505] Q. Where specifically?
A. On Burton.
Q. On Burton?
A. Yeah.
Q. Right on your own little street there?
A. Yes, sir.
Q. Were drugs expensive?
A. Not really.
Q. Let's put it this way. You generally had enough money with you that you could get them? Is that correct?
A. Yes, sir.

Q. Were they hard to find? Was it hard to find the people that had these drugs?

A. No, sir, not all the time.

Q. Now, you remember before the trial the three psychiatrists came up to see you?

A. Yes, sir.

Q. And do you recall telling them that the best thing that had ever happened to you in your whole life was when you got high?

A. Yes, sir.

Q. Is that true?

A. Yes, sir.

Q. Now, you remember seeing the doctors again, I think, last week after the trial?

[506] A. Yes, sir.

Q. Did the doctors ask you at that time anything about your past drug or glue or marijuana habits?

A. No, sir.

Q. Did they ask you how long you had taken drugs?

A. No, sir.

Q. In other words, the only time they discussed drugs with you is when you were examined prior to trial; is that correct?

A. Yes, sir.

Q. Now, when you went to school—you said that you had bought drugs at school. Did you take the drugs right there?

A. Yes sir, in school.

Q. O. K. Was there—in other words, when you were in school were you under the influence of drugs?

A. Yes, sir.

Q. Most of the time or daily or infrequently? How often when you went to school were you under the influence?

A. Most of the time.

Q. Do you recall the night of October 16, 1974, when Mr. Graber was killed?

A. Yes, sir.

Q. Did you take any drugs that night?

A. Yes, sir.

Q. And where were you when you took the drug?

[507] A. At the center.

Q. And what did you take?

A. I smoked some marijuana, took some Mescaline.

Q. And I think you said earlier that Mescaline is a down. Is that correct?

A. Yeah.

Q. Do you recall how you felt that night with the effects of the Mescaline and marijuana?

A. Relaxed.

Q. Do you think, Willie—let me ask you this. How long did that last—did that feeling last?

A. About two or three hours.

Q. And do you think that made you more willing to go along with Sam Hall that night?

MR. WHALEN: Objection.

JUDGE KEEFE: It will be overruled.

A. Yes, sir.

BY MR. HOEFLE:

Q. Did you make any of the decisions that night as far as to take the car or to put Mr. Graber in the trunk or to drive the car to where you drove it? Did you make any of those decisions?

A. No, sir.

Q. Who made those decisions?

A. Sam.

[508] Q. Now, directing your attention again to that night, were you afraid that night at any time?

A. Yes, sir.

Q. And at what point did you become afraid?

A. When I saw the shotgun.

Q. Now, you saw the shotgun several times that night, I think, didn't you?

A. Yes, sir.

Q. Which time did you become afraid of the sawed-off shotgun?

A. When he got out of the car.

Q. Now, which time—again you got out of the car several times?

A. In the garage.

Q. Was that before Mr. Graber was put in the car?

A. Yes, sir.

Q. And you said that Hall gave you instructions. Did you follow those instructions?

A. Yes, sir.

Q. Why?

A. Well, because I was scared.

Q. Do you think the fact that you were high at the time had something to do with your going along with them, with these instructions?

A. Yes, sir.

[509] Q. Do you think if you had been perfectly clear-minded you would have gone along with this scheme of Hall's?

A. No, sir.

Q. Did Sam Hall ever tell you that he intended to kill Mr. Graber before he actually did it?

A. No, sir.

Q. Now, did Mr. Graber say anything to you at all that night?

A. No, sir.

Q. Do you recall if he looked at you?

A. No, sir.

Q. You don't recall—or he didn't look at you? I'm sorry.

A. He didn't.

Q. Did he touch you that night?

A. No, sir.

Q. Did you touch him that night?

A. No, sir.

Q. Was Mr. Graber conscious the last time you actually saw him, personally?

A. The first time I seen him he was in the same condition.

Q. Was he alive?

A. Yes, sir.

[510] Q. Had he been wounded?

A. No, sir.

Q. Now, with respect to Sam Hall, did you know him very well before October 16?

A. No, sir.

Q. How did you know—how did you look at this guy? How did you—what did he mean to you?

A. Well, like a big brother.

Q. He was older than you?

A. Yes, sir.

Q. I think you told the psychiatrists or Mr. Dell that you sort of admired his style. Is that accurate?

A. Yes, sir.

Q. Now, when you were arrested you gave the police a recorded statement, which we heard in court, didn't you?

A Yes, sir.

Q. And you also talked to the psychiatrists a couple of times?

A. Yes, sir.

Q. And you talked to Mr. Dell from the probation department?

A. Yes, sir.

Q. In each of those statements did you tell the truth?

A. Yes, sir.

Q. Willie, how do you feel about this now, looking back [511] on it?

A. Sorry.

MR. HOEFLE: That is all we have from the defendant, your Honor.

JUDGE KEEFE: O. K. Step down.

(Witness excused.)

MR. HOEFLE: Our next witness, you Honor, will be Mr. Nick Dellecave.

NICK C. DELLECAVE

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q. Could you give us your full name and address?
A. Nick C. Dellecave, 3022 Wardall Avenue.
JUDGE KEEFE: Spell your last name.
THE WITNESS: D-e-l-l-e-c-a-v-e.
JUDGE KEEFE: Thank you.

BY MR. HOEFLE:

Q. How are you employed, sir?
A. I'm a teacher at McMillan Center.
Q. And where is McMillan Center?
A. 608 East McMillan Street, close to Walnut Hills.
Q. O. K. Is that the old Board of Education Administration Building?
A. Yes, sir.
[512] Q. What kind of school is that?
A. It's a special school; it's classified as special school.
Q. And what is the purpose of the special school?
A. The purpose, as I see it, is to help students that can't cope with normal school situations for some reason or another.
Q. I see. Is this like Conditt School, a school for the physically handicapped?
A. No.
Q. What type of handicap do these children have—or if it is a handicap—at McMillan?
A. I guess you would classify it as emotional.
Q. Are these persons considered—these students considered by the School Board as normal children?
A. In what respect?

Q. Well, emotionally or psychologically normal.
A. Emotionally, I would say, no.
Q. How long have you been a teacher, Mr. Dellecave?
A. This is my third year.
Q. In that time could you estimate for the court how many students you have taught?
A. Please?
Q. Can you estimate for the court during that time how many students you have taught?
[513] A. Hundreds.
Q. And you are familiar, are you, with the manner in which average, normal children act and behave?
A. I believe so, yes.
Q. May I ask you how old are you?
A. I'm 27.
Q. And I would assume, then, that you also—in your 27 years—would know how normal, average adult people behave?
A. Yes.
Q. Do you know the defendant, Willie Bell?
A. Yes.
Q. How do you know Willie?
A. Through school. He was a student of mine.
Q. O. K. How long have you known Willie?
A. Approximately a year and a half, maybe a little more.
Q. And was he a student up at McMillan?
A. Yes.
Q. How frequently would you see Willie?
A. I had him one class a day. I saw—he attended class pretty regularly.
Q. Would you see him in school outside of that class occasionally?
A. No, I wouldn't.
Q. How many were in a class up there, on the average?
A. The average class attendance is around ten students, [514] eight students, something like that.
Q. Would you see him at other times during the school day other than in your class?
A. Around the school, in the halls, cafeteria.

Q. Can you describe for the court Willie's general behavior and his mannerisms, how he acted?

A. He had kind of a I-don't-care attitude; he was always tired, kind of listless; he always appeared to be tired to me when he was in class. He didn't initiate too much.

Q. I see. Do you have a problem up at McMillan Center generally with students who take drugs?

A. Yes.

Q. And you have seen a lot of these children yourself, I suppose?

A. Yes.

Q. Could you say that Willie appeared to be on drugs when he was at McMillan?

A. Yes.

Q. And would you consider Willie emotionally stable for his age at that time?

A. No.

Q. Then, by adult standards, would you consider him as emotionally stable as a normal adult?

A. No, I wouldn't.

MR. WHALEN: Objection.

[515] JUDGE KEEFE: Overruled. The answer stands.

BY MR. HOEFLE:

Q. Would you consider Willie mature for his age or as mature for a normal person of his age?

A. No.

Q. And would you again, considering Willie by adult standards, consider him a mature person?

A. No, I wouldn't.

Q. You testified, in your opinion, that Willie was under the influence of drugs. How frequently would that be?

A. It was most of the time I saw him he would appear to be under the influence of something.

Q. And I think you testified his attendance was fairly regular?

A. Yes, it was.

Q. O. K.

A. I'm saying for my class now.

Q. How many days a week does McMillan operate?

A. Five days a week.

Q. And the usual school year, nine months, whatever?

A. Yes.

MR. HOEFLE: No further questions.

JUDGE KEEFE: Any cross, gentlemen?

MR. WHALEN: No cross-examination.

JUDGE KEEFE: All right, Mr. Dellecave. You may [516] step down, sir.

(Witness excused.)

MR. HOEFLE: Our next witness is Mrs. Eva Montgomery.

EVA MONTGOMERY

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q. Please state your name and address, please.

A. It's Eva Montgomery, 3949 Kirkwood Avenue, Kennedy Heights.

Q. That is in Cincinnati, isn't it?

A. Yes.

Q. What is your occupation, Mrs. Montgomery?

A. A teacher at McMillan Center.

Q. Could you describe for us what your interpretation of the purpose or function of the McMillan Center is?

A. McMillan Center is a school for disruptive youth. Youths who cannot function in regular schools are transferred to McMillan.

Q. Are these youths that have any physical problems or physical handicaps?

A. Not physical, no.

Q. How would you describe it?

A. They are emotionally immature—that's the goodest word—and unable to adjust or are experiencing severe adoles- [517] cent problems.

Q. Are these children considered by the school board as normal children?

MR. WHALEN: Objection.

JUDGE KEEFE: Wait a minute now. Wait a minute.

MR. MECHLEY: Your Honor, may I perhaps help the panel on this?

JUDGE KEEFE: We are willing to hear from you.

MR. MECHLEY: It is my opinion, and I think it is supported by the sections applicable here, that this is not a normal hearing in the sense of various evidentiary standards which we would use in trial. I think the court is aware that it says—

JUDGE KEEFE: Overrule the objection.

BY MR. HOEFLE:

Q. Are these children considered normal by the school board?

A. No, they are not.

Q. How long have you been a teacher, Mrs. Montgomery?

A. Twelve years.

Q. And in that time can you estimate how many children you have taught?

A. Thousands.

Q. Are you familiar with the manner in which common, normal children behave?

[518] A. Yes, I'd say so.

Q. May I ask how old are you?

A. Forty-one.

Q. In your 41 years you have noticed how average, normal adults behave also; is that correct?

A. Yes, I have.

Q. Now, do you know Willie Bell, the defendant in this case?

A. Yes.

Q. How do you know him?

A. I taught Willie a year and a half.

Q. O. K. Where was this?

A. At McMillan Center.

Q. And how frequently would you see Willie at McMillan?

A. Well, three or four times a week for one hour a day, during lunchtime and in the mornings before school.

Q. Could you describe for the court Willie's general behavior or his mannerisms, how he acted?

A. Willie was emotionally immature. He was generally docile, apathetic—just—well, drugged or down.

Q. Has Willie admitted to you that he takes drugs?

A. Yes. Willie was in my homeroom and we had a lot of conversations.

Q. I see. Do you have an opinion as to whether Willie was under the influence of drugs at school?

[519] A. I would say all the time. He was always down or coming down. He tried hard to work with you, but he just couldn't.

Q. When he was down would he be more suggestible and easier to manipulate?

A. Yes, he would. He was just—as I said, he had a I-don't-care attitude. He was down most of the time and slouching—

Q. And when he was in that condition would he argue or be belligerent at all?

A. No. He was never aggressive or never involved in anything, any fights or anything.

Q. When he was down he would do just what you told him?

A. He just wanted to be left alone, with his head down.

Q. O. K. Would you consider, Mrs. Montgomery, Willie emotionally stable for his age?

A. No.

Q. Would you consider Willie, then, emotionally stable by adult standards?

A. No, I would not.

Q. Would you consider him mature for his age?

A. No.

Q. Would you consider him mature by adult standards?

A. No.

MR. HOEFLE: No further questions.

[520] CROSS-EXAMINATION

BY MR. WHALEN:

Q. Mrs. Montgomery, what period of time was it that you had this contact with Willie Bell?

A. During a year and a half of a school year, from September of '73 to September '74 and January—January, February—January—the end of the school year '73 and '74 and the fall before, a full school year and a half.

Q. So would it have been the full school year of '73? Is that correct?

A. Yes.

Q. And part of the school year of '74?

A. Yes.

Q. From September till when?

A. Till—well, December, the end of the school year, at the end of '73 and the beginning of '74, January through May.

Q. So the last contact you had with Willie Lee Bell would have been, say, June of '74? Is that correct?

A. No. I saw Willie in September of '74 and October. He came around the school and I talked with him.

Q. Was he a student at that time?

A. No.

Q. How many times did you have a contact with him in September and October?

[521] A. I would say twice.

MR. WHALEN: Thank you.

MR. HOEFLE: One more question.

JUDGE KEEFE: O.K.

REDIRECT EXAMINATION

BY MR. HOEFLE:

Q. Mrs. Montgomery, isn't it a fact that the last time you saw Willie was after Mr. Graber had been killed?

A. Yes, it was after.

Q. Isn't it true that Willie was at the time you saw him at McMillan Center—on that occasion was under the influence of drugs?

A. Yes, I would say he was.

MR. HOEFLE: No further questions.

JUDGE KEEFE: You are at McMillan Center now, Mrs. Montgomery?

THE WITNESS: Yes.

JUDGE KEEFE: How many students do you have up there currently? If you don't know exactly, roughly how many?

THE WITNESS: Approximately a hundred and seventy.

JUDGE KEEFE: About a hundred and seventy?

THE WITNESS: Yes.

JUDGE KEEFE: From what ages to what ages, roughly?

THE WITNESS: Roughly from 15 to 17, but there are three programs. Our program is upstairs. There's another [522] program downstairs of about eight hundred and a pregnant-adolescent program of, I'd say, about a hundred.

JUDGE KEEFE: Thank you very much. You may step down.

(Witness excused.)

MR. HOEFLE: Our next witness is Mrs. Cheryl Vilas.

CHERYL VILAS

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q. Mrs. Vilas, could you state your name and spell your last name, please?

A. My name is Cheryl Vilas, V like in Victor, -i-l-a-s.

Q. What is your occupation, Mrs. Vilas?

A. I'm a teacher at McMillan.

Q. And is this McMillan Center?
A. Yes.
Q. Could you describe for us in your own terms what kind of a school McMillan is?
A. Just as Mr. Dellecave and Mrs. Montgomery stated, it's a school for kids that can't adjust to regular school. That means cope in one way or another. So they are referred to our school.
Q. Are you speaking because of physical problems?
A. No; emotional problems, family problems.
[523] Q. How long have you been a teacher, Mrs. Vilas?
A. Five years.
Q. Could you estimate for the court the number of children that you have taught in that time?
A. Hundreds.
Q. And you are familiar with the manner in which average, normal children behave?
A. Yes.
Q. And may I ask how old you are?
A. Thirty-two.
Q. In your 32 years you have also dealt with adults and you would know how average, mature adults would behave?
A. Yes.
Q. Do you know Willie Lee Bell, the defendant in this case?
A. Yes, I do.
Q. How do you know Willie?
A. He's a student in my classroom.
Q. How long have you known him approximately?
A. About a year and a half.
Q. How frequently would you see Willie at school?
A. Pretty frequently. He was in my—one of my classes, but I'd see him in the hall and in the cafeteria.
Q. Throughout the day?
A. Yes.
[524] Q. How was his attendance?
A. He had good attendance.
Q. How about his work?
A. There were days when Willie just couldn't get it together to work. There's some days when he could.

Q. Now, have you had occasion at McMillan and perhaps other schools to observe children who were under the influence of drugs?
A. Yes.
Q. I see. Would you say or could you give us your opinion on whether or not Willie had ever used drugs in school?
A. Yes, he had.
Q. How frequently would you say?
A. I'd say most every day. That's why he couldn't get it together to work.
Q. Could you relate to the court—I believe there is an incident when Willie was hitchhiking. Can you relate that to the court?
A. I was on my way home and Willie was kind of out in the street thumbing on Reading Road and so I picked him up and he told me he was like really messed up, that he was tripping on acid, and I said, "Well, I think I'd better take you home," and I took him home.
Q. Could Willie conceptualize things? Was it easy for him, especially when he was on drugs, to know what was going on?
[525] A. No, not really. That's why he had so much trouble getting, you know, getting himself together to do some work. I think, you know, when—well, I didn't see him too often when he wasn't on something.
Q. Did you see him on this occasion that Mrs. Montgomery discussed in October after Mr. Graber was killed?
A. Yes.
Q. And was Willie under the influence of drugs at that time?
A. As far as I could tell, yes.
Q. Just the same as he had been?
A. It seemed worse. Willie used to be kind of chubby and then he just—he really looked burned out.
Q. Now, would you consider Willie emotionally stable for his age?
A. No.

Q. By adult standards would you consider him emotionally stable?

A. No.

Q. How would you describe him with reference to the maturity of the average 16-year-old child?

A. I think that Willie has had quite a few problems. I think that's why he was in our school and I don't think—as far as him being mature for a 16-year-old, no.

Q. Would he be mature by adult standards?

[526] A. No.

MR. HOEFLE: No further questions.

MR. WHALEN: I have no questions.

JUDGE KEEFE: O.K. Mrs. Vilas, you may step down.

(Witness excused.)

MR. HOEFLE: Our next witness will be Shirley Ratliff.

SHIRLEY RATLIFF

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOEFLE:

Q Will you state your name and spell your last name, please?

A. Shirley Ratliff, R-a-t-l-i-f-f.

Q. And what is your occupation, Mrs. Ratliff?

A. School psychologist.

Q. How long have you been so employed?

A. Four years.

Q. Did you have occasion in 1972 to prepare an evaluation of Willie Bell, the defendant?

A. Yes, I did.

Q. I see. And what did you do in making this report? What kind of preparation did you make before you made your report?

A. You mean on the tests—

Q. What did you do with Willie—

[527] A. A test usually—or an evaluation usually includes interview, observation of the student during the interview, or in the hall or somewhere else if I see him, possibly in the classroom, tests of various types, mental abilities, achievement and projective testing.

Q. And these were done with Willie?

A. Yes.

Q. O.K. And did you interview him?

A. Yes, I did.

Q. Did you ultimately prepare a report based on the tests and the interviews?

A. Yes, I did.

MR. HOEFLE: Will you mark this.

(Defendant's Exhibit No. 1, 2/3/75, was marked for identification.)

BY MR. HOEFLE:

Q. I show you what has been marked for identification purposes as Defendant's Exhibit No. 1. Is that a true copy of the report you prepared? Take your time and look it over, please.

MR. MECHLEY: Your Honor, while she is looking at that, we have already given the prosecutor a copy of that report.

A. Yes.

MR. HOEFLE: I have no further questions of the [528] witness, your Honor.

MR. WHALEN: No questions, your Honor.

JUDGE KEEFE: O.K., Mrs. Ratliff. You may step down.

(Witness excused.)

MR. HOEFLE: Your Honor, I would like to offer this for whatever consideration the court would give it. I have copies prepared for the court.

JUDGE KEEFE: It may be admitted.

(Defendant's Exhibit No. 1, 2/3/75, heretofore marked for identification, was received into evidence.)

JUDGE KEEFE: Next witness.
MR. MECHLEY: Detective Tom Jones.

TOM JONES

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MECHLEY:

Q. Give the court your full name and address, please.
A. Tom Jones, 2470 Daily Road, Columbus, Ohio.
Q. By whom are you employed, Mr. Jones?
A. Columbus, Ohio, Police Department.
Q. In what capacity, sir?
A. The homicide division.
Q. What is your rank with the homicide division?
A. Detective.
[529] Q. How long have you been with the Columbus Police Department?
A. Nineteen years.
Q. I see. Would you describe just briefly the various roles you performed as a police officer with the Columbus Police Department during those 19 years?
A. All acts of violence.
Q. That could be misinterpreted.
Detective, would you tell me if you happened to come in contact with the co-defendant in this case, a man by the name of Samuel Hall?
A. I did.
Q. In what capacity? In what manner did you come into contact with him?
A. Mr. Hall was in custody in Montgomery County when I talked to him.
Q. This is in Dayton?
A. Dayton, Ohio.
Q. Would you tell the court why you happened to be talking to him?
A. We received information from the Montgomery County Sheriff's Department that Samuel Hall wanted to give us information on a crime which was committed in Columbus, Ohio.

Q. And did you have an opportunity then to interview Mr. Hall?
[530] A. Yes, sir.
MR. MECHLEY: Would you mark this.

(Defendant's Exhibit No. 2, 2/3/75, was marked for identification.)

BY MR. MECHLEY:

Q. Let me show you what has been marked for identification as Defendant's Exhibit No. 2, and ask you if you can identify that?
A. Yes, sir.
Q. What is it?
A. This is a folder I had with me when I talked to Mr. Hall and I took down notes as he was telling me certain things.
Q. So that the handwriting on that folder is your handwriting?
A. Yes, sir.
Q. What was the first date that you came in contact with the defendant, Hall?
A. October 28, in the morning hours, of 1974.
Q. This is in Montgomery County?
A. Yes, sir.
Q. Did you have an opportunity to discuss with him the things that were of concern to you in the Columbus Police Department?
A. Yes, sir, I did.
Q. O.K. Would you tell me whether or not he offered [531] to you any information or any additional statements other than those concerning what you were talking to him about?
A. Yes, sir, he did.
Q. Did you make any—did you ask him any questions which led up to his making these particular statements about the information contained in the statements he made to you?
A. In reference to the crime here?
Q. That is correct.
A. No, sir, I did not.

Q. Did you make any reference whatsoever to the death of Julius Graber?

A. No, sir.

Q. Did you make any reference whatsoever to Willie Bell?

A. No, sir.

Q. Did you make any reference whatsoever to the—I'm sorry—to the City of Cincinnati Police Department?

A. No, sir.

Q. Could you tell us in terms of the time span of your interview with Hall, Sam Hall—at what time during that interview did he make these statements that you wrote down in your own handwriting on that envelope?

A. The first time I talked to him, I'd say, probably an hour.

Q. No. I'm sorry. What I am trying to get at, from the beginning or end or middle of your conference with him.

[532] A. Oh, this would be in the middle.

Q. In the middle?

A. Right.

Q. Would you tell the court exactly what he said on the 28 to you?

MR. WHALEN: Objection, your Honor.

JUDGE KEEFE: Overruled.

A. Yes, sir. He said to me to get information to Mr. Bell, who is the defendant in this case, to tell Bell not to tell the police that he shot the old man, tell him we were sitting on the porch at the time.

BY MR. MECHLEY:

Q. What was the reference to the pronoun he? Was the reference, as you understood it, to Hall or to Bell?

MR. WHALEN: Objection.

JUDGE KEEFE: Sustained.

BY MR. MECHLEY:

Q. When you wrote that down you wrote that down in your handwriting; is that correct?

A. Yes, sir.

Q. Would you tell the court—is that the statement exactly as he gave it?

A. Yes, it was.

Q. Repeat that statement exactly as he gave it.

MR. WHALEN: Objection.

[533] JUDGE KEEFE: Overruled.

A. "Tell Bell not to tell police he shot old man. Tell him we were sitting on porch at the time."

BY MR. MECHLEY:

Q. Now, was it your understanding that he was asking—he was asking you to deliver a message; is that correct?

A. Yes, sir.

Q. To Bell?

A. Yes, sir.

Q. So it was important to him that you understand the message; can we agree on that?

A. That's correct.

Q. Was it your understanding of the message that you were to tell Bell not to tell the police that Bell shot the old man or that Hall shot the old man?

MR. WHALEN: Objection.

JUDGE KEEFE: What a minute, Mr. Jones. Don't answer that.

We will sustain that, please.

BY MR. MECHLEY:

Q. Do you have an opinion as to how he meant shot the old man?

MR. WHALEN: Objection.

JUDGE KEEFE: Sustained.

[534] BY MR. MECHLEY:

Q. When did you have an opportunity to talk with Hall again?

A. It would be on the 31 day of October 1974.

Q. And at that time you discussed with him again the details of some particular fact situation that you were interested in as far as the Columbus City police were concerned?

A. That's right.

Q. During this conference did he again make certain proffers to you regarding the Julius Graber killing?

A. He did.

Q. Did you have an opportunity to write those down?

A. Yes, sir.

Q. Would you tell the court what he said?

A. He stated again, "Tell Bell in Cincinnati to keep his mouth shut. Don't tell police I did the shooting. Tell him we were sitting on porch."

He did not trust the Dayton police and, "Tell Bell he will say the same thing on killing the old man."

Q. Did you have any further conversations with Sam Hall regarding the statements?

A. I don't believe so, no, sir.

Q. This is the extent of the proffer of information to you regarding the Julius Graber killing?

A. That's correct.

[535] MR. MECHLEY: No further questions.

CROSS-EXAMINATION

BY MR. WHALEN:

Q. All right. Officer Jones, I believe you stated that there were two statements that you took from Samuel Hall. Is that correct?

A. That's correct.

Q. In one of them he stated, "Tell Willie Bell not to state he did the shooting." Is that correct?

A. That's correct.

Q. And the second statement is, "Tell Willie Bell not to say I did the shooting." Is that correct?

A. That's correct.

Q. Now, the second statement, "Tell Willie Bell not to say that I did the shooting," did you interpret that as a police officer in the investigation to mean that Samuel Hall was admitting that he did the shooting?

A. It was my opinion at the time.

Q. And if I told you, officer, that Samuel Hall stated, in fact, that Willie Bell did the shooting, yould you interpret that differently then?

MR. MECHLEY: There will be an objection.

JUDGE KEEFE: We will overrule the objection.

MR. MECHLEY: Your Honor, may we be heard? Reference here is made—and I think this goes to the form of the [536] question and I am even willing not to concern myself with that—if he will mention the date and the time and the place that Mr. Hall made these statements. He is making reference to two statements made almost a week before the statement of this gentleman. It seems to me, even under good form, he has to tell this gentleman when those statements were made in order for this gentleman to intelligently answer this question.

JUDGE KEEFE: Are you willing to provide that information in your inquiry?

MR. WHALEN: Yes.

BY MR. WHALEN:

Q. Officer Jones, if I told you that at 5:20 p.m. on October 23, 1974, Samuel Hall stated, "Willie Lee Bell fired the shotgun," would that change your interpretation of that statement?

A. It might.

MR. WHALEN: Thank you. I have nothing else.

REDIRECT EXAMINATION

BY MR. MECHLEY:

Q. Officer, in order to let you play a complete game for Hamilton County, if I told you that on the 22 of October at 5:45 p.m. he said that Buzz Lukins shot this old man, would that change your statement?

A. I don't think so.

[537] Q. I don't either. As a matter of fact, his statement was taken—was volunteered; is that correct? It was not taken as a result of any indepth interrogation or any interrogation concerning Julius Graber?

A. Strictly voluntary.

Q. In fact, it came out of the blue as far as you were concerned?

A. That's correct.

Q. And it was given to you in the form of a mission or message to be given to Bell; is that correct?

MR. WHALEN: Objection.

JUDGE KEEFE: Overruled.

A. That's correct.

BY MR. MECHLEY:

Q. And as a matter of fact, it was given a week after both of the statements that both the prosecutor and I mentioned to you, is that correct, the 21 and 22; your two statements were given on the 28 and the 31?

A. That's correct.

Q. And the 31 statement reconfirmed the statement and the exact nature of the statement given on the 28, didn't it?

MR. WHALEN: Objection.

JUDGE KEEFE: Sustained.

MR. MECHLEY: No further questions.

JUDGE KEEFE: May I excuse the witness, gentlemen?

[538] MR. WHALEN: Yes, sir.

JUDGE KEEFE: O.K., Officer Jones. You may step down.

(Witness excused.)

MR. MECHLEY: Your Honor, could we have a photocopy made of those statements so the officer can take the envelope with him? We would like to offer that in evidence.

JUDGE KEEFE: Well, are you asking my staff to assist you in the preparation of the photocopy?

MR. MECHLEY: Yes, I am.

JUDGE KEEFE: All right. O.K. Mr. Harris will help you.

Call your next witness.

MR. MECHLEY: Your Honor, we would move the admission of the envelope, handwritten statement.

JUDGE KEEFE: Well, let's wait until they get back with the papers.

MR. MECHLEY: O.K. We rest, your Honor.

JUDGE KEEFE: All right, Mr. Prosecutor.

MR. WHALEN: We call Doctor Robert McDevitt.

Your Honor, may I have the original report of the doctors.

(State's Exhibit No. 3, 2/3/75, was marked for identification.)

[539] ROBERT JOHN McDEVITT, M.D.

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHALEN:

Q. Doctor, would you state your full name and spell your last name, please?

A. Robert John McDevitt, M-c-D-e-v-i-t-t.

Q. And where are you presently employed, sir?

A. Good Samaritan Hospital, director of the department of psychiatry, 3217 Clifton Avenue.

Q. Doctor, can you give us a brief background as to your education?

A. Pre-med, Xavier University; medical school, St. Louis University, 1955; internship, Good Samaritan Hospital, '55 to '56; residence at the Ohio State, 1956 to 1961; certified by the American Board of Psychiatry and Neurology; fellow of the American Board of Psychiatry and Neurology; associate clinical professor at the University of Cincinnati; attending staff and director of the department at Good Samaritan Hospital.

Q. And for what period of time have you been director of the department of psychiatry at Good Samaritan Hospital?

A. Since 1970.

Q. Were you requested by the court to make an examination of the defendant, Willie Lee Bell?

A. That's correct.

[540] Q. How many examinations have you made?

A. Doctor Whitman, Doctor Seymour and myself examined Mr. Bell on two occasions; first before he stood trial as to the question of his competency to stand trial and after his conviction, using the Revised Code sup-

plied by Mr. Mechley to evaluate his—where he stood in terms of the new provisions of the law.

Q. Now, doctor, can you tell the court what you found in your examination or—let me strike that.

A. Which examination?

Q. That is just what I was going to get into. What was the date of your last examination of the defendant, Willie Lee Bell?

A. The last examination was on January 23, 1975. The previous one, I recall, was just a day before his birthday—I remember that rather distinctly. Doctor Seymour examined him on the 23. Doctor Whitman and I examined him on the 22.

Q. Now, in your examination on the 22 day of January 1975, will you tell the court as part of your examination what I.Q. you found the defendant to have?

A. Well, this is a rather controversial issue, but we —the first time we were under the impression that he was not very bright; the second time around—of course, he had been in jail for a number of weeks, apparently had been off of drugs and had been much more alert. We found he was very sharp; that [541] using the reverse-word test Doctor Whitman and I gave him, he did seven letter words, forward and backward, which would indicate an I.Q. of above average. Perhaps we—estimated perhaps a hundred ten, a hundred twenty, at that time.

Q. How does that stand in a normal I.Q. for a 17-year-old?

A. From our examination on the 22 he seemed a little brighter than average. On the previous examination he had been rather dull and unanimated.

Q. Were you ever able to determine any of the hobbies with which he occupies himself while in the jail?

A. Yes. He plays chess quite big.

Q. And could you determine as to how capable he is?

A. He's supposed to be the second-best player there; sometimes the first-best player, depending on who is there.

MR. HOEFLE: Objection and move it be stricken.

JUDGE KEEFE: Overruled. It may stand.

BY MR. WHALEN:

Q. Doctor, one of the questions you were asked to look into was the question of whether or not the victim of this particular offense induced or facilitated the crime that was committed?

A. I am not quite sure that that's our province to ask, but we did ask the question and found out the defendant gave no evidence—or at least no—told us that Mr. Graber in no way [542] said or did anything to provoke the incident.

Q. Were you able to determine whether or not at the time that this crime was committed Willie Lee Bell was, in fact, under any durress, coercion or strong provocation?

A. Again, this is one that we had great difficulty with, because we felt that—he initially told us that he was frightened of Sam Hall. Then when we questioned him he was not, but we found out that he was a young man who was easily led and we felt that there was strong motivation to follow along with Mr. Hall, but he was not aware of anything like this and could not verbalize any feelings in this respect. He admitted that he had not felt any fear but did claim that he was trying—had made arrangements at one time to get away.

Q. Were you able to determine at the time that this offense was committed that it was primarily the product of the offender's psychosis, of mental deficiency—

MR. HOEFLE: Objection to the form of the question.

JUDGE KEEFE: Overruled.

JUDGE MATTHEWS: You may answer, doctor.

THE WITNESS: Pardon me? Whether he had a mental psychosis at the time?

BY MR. WHALEN:

Q. Yes.

A. He did not.

Q. Or mental deficiency?

[543] A. As I understand mental deficiency, in terms of his intellectual ability, he did not. In a broader sense, he probably was not able to appreciate completely all the factors around him, and the one thing we did stress very strongly with him is, if he did not do anything actually, did he realize he was giving consent by passively accompanying the individual, and he claimed that he did not understand that this was giving acceptance to the behavior of Mr. Hall, and we struggled with him quite a bit with this, and he adamantly refused to accept any responsibility for accompanying Hall during this period of time.

Q. And this was the only area that you found he was unable to comprehend?

A. Right, yes.

MR. WHALEN: I have no other questions.

CROSS-EXAMINATION

BY MR. MECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a [544] lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes.

Q. Did you have an opportunity to consider in this report the issue of drugs?

A. No, we did not.

MR. MECHLEY: Thank you. No further questions.

JUDGE KEEFE: Anything further, Mr. Prosecutor?

MR. WHALEN: Yes, your Honor. Just one other thing.

REDIRECT EXAMINATION

BY MR. WHALEN:

Q. Doctor, the item you made reference to in what has been marked for purposes of identification as State's Exhibit No. 3, would you tell the court what that is?

A. State's Exhibit No. 3 is the report to the three-judge panel replying to their direction to examine him—examine him according to the Revised Code.

Q. And is this report prepared by you?

A. Yes, it is, Doctor Seymour, Doctor Whitman and myself. [545] There is an addendum by Doctor Seymour.

Q. And it was submitted by you to the court?

A. Right.

MR. WHALEN: I have no other questions.

JUDGE KEEFE: You may step down.

THE WITNESS: May I be excused?

JUDGE KEEFE: May I excuse Doctor McDevitt from the Courthouse?

MR. MECHLEY: Certainly.

(Witness excused.)

MR. WHALEN: At this time we will ask that State's Exhibit No. 3 be received by the court.

JUDGE KEEFE: It may be admitted.

(State's Exhibit No. 3, 2/3/75, heretofore marked for identification, was received into evidence.)

MR. WHALEN: Your Honor, we will not call the other two examining physicians.

JUDGE KEEFE: May I excuse Doctor Seymour and Doctor Whitman?

MR. WHALEN: Yes, Your Honor.
THE COURT: Mr. Mechley and Mr. Hoefle?
MR. MECHLEY: Yes, your Honor.
JUDGE KEEFE: All right, gentlemen. All three of you are excused, please.
MR. MECHLEY: Your Honor, at this time may we have [546] Defendant's Exhibit No. 2 put into evidence?
JUDGE KEEFE: Is that this (indicating)?
MR. MECHLEY: Yes, it is.
JUDGE NURRE: There is no objection?
MR. WHALEN: No, we have no objection.
JUDGE KEEFE: It is admitted.

(Defendant's Exhibit No. 2, 2/3/75, heretofore marked for identification, was received in evidence.)

MR. WHALEN: May we approach the bench a moment, judges?
JUDGE KEEFE: O.K.

(Discussion at the bench.)

JUDGE KEEFE: The court is limiting each side on the motion for an order declaring death penalty unconstitutional—the court is limiting each side to a maximum of ten minutes.

MR. HOEFLE: May it please the court, counsel, Willie, the Supreme Court, as we all know, in Furman versus Georgia, by a five to four vote, ruled the death penalty unconstitutional.

The judges were sort of divided. Justices Brennan and Marshall felt that the death penalty was unconstitutional under any circumstances, because it was cruel and unusual, and the other three of the majority judges, Douglas, White, and Stewart, felt that the penalty as it is presently, or [547] was presently then, composed was unconstitutional; that they did not have to reach the question of whether it was cruel or unusual, only the fact that the application was cruel and unusual.

But Mr. Justice Stewart stated in his opinion, "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of the rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

And that is from a judge that—one of the so-called swing judges, who did not say, "Well, it is cruel and unusual," but he did say it was just a renunciation that is embodied in our concept of humanity. So the old Ohio statute went out the window and the General Assembly set out to re-write the capital punishment into Ohio law to get around the Supreme Court decision or comply with it.

In other words, I think we can assume their intent was not to make it cruel or unusual. And the Supreme Court would have no problem.

One of the first things they did to make it less cruel was to abolish the provisions of mercy. You might [548] have expected them to keep it, but mercy in itself is no longer a part of the Ohio law. And certain factors which I think—particularly in this case—would lead to a strong argument that mercy should be extended is the youth of the accused, the fact that he cooperated with the police, the fact that he told the truth, and the fact that the state, despite the claims of its opening statement at the trial, came nowhere near proving that Willie Bell participated in the actual act of killing Mr. Graber.

These things, I think, could legitimately have been argued under the old law to mitigate toward mercy, but under this new supposedly less cruel statute we are precluded from so doing.

Now, the new statutes provide for separate trials for guilt and for penalty—or for punishment.

Now, I think the General Assembly felt that, "Well, if we do this, then perhaps the Supreme Court will not find that it is cruel and unusual." But California has a statute which was twice declared cruel and unusual by its own supreme court and by the Supreme Court, and that also provided for a separate trial. That included not only three mitigating factors but anything that the

defendant might want to put in there was permissible. That statute provided the death penalty shall not be imposed, however, upon any person who is under the age of 18 years at the [549] time of the commission of the crime.

That California statute became effective in 1970. It is much more liberal and, shall we say, less cruel than our present statute. Yet it has always been ruled unconstitutional, because it was cruel and unusual.

The final point, it had appeared to me—or at least I had been under the impression—that our new House Bill 511 was basically the Model Penal Code with just a few changes, and I found that is not the case. In the case in which we cited in our motion, McGautha versus California, upholding the death penalty in California not too long ago, at 402 U.S. 222, in the appendix, in one of the justices' opinions, the capital punishment portion, or the death penalty, for aggravated murder, or for whatever they call it in the Model Code is set out, and it also lists mitigating circumstances and aggravating circumstances. But, unlike the Ohio statute, I believe there are at least eight mitigating circumstances. Our legislature kept some of the mitigating circumstances. The three we had are also in the Model Penal Code.

I just want to read three that are not, that our General Assembly took out, under Sub-Section A, under the Model Penal Code, under the mitigations, was "The defendant has no significant history of prior criminal [550] activity."

Sub-section C provided as a mitigating factor, "The defendant was an accomplice in the murder committed by another person and his participation in the homicidal act was relatively minor."

And Sub-section H, "The youth of the defendant at the time of the crime."

These are three things that are present in the Model Penal Code, which are not in the Ohio—our new penalty code.

These factors, along with the California factors, indicate that, rather than being more cruel—or, pardon

me—less cruel and unusual, the new Ohio statute is, in fact, more so. They eliminated mercy. They bastardized the Model Penal Code, and in this case we feel, particularly because three of the Model Penal Code provisions would be precisely in point here, and, finally, there is a provision in the penalty statute which we feel makes it unconstitutional, because it, in effect, qualifies the right to trial by jury.

A defendant has a three-time better chance at mercy if he proceeds to trial before a three-judge panel, because your decision to put him in the electric chair would have to be unanimous. If one of the three-judge panel decides that the mitigating circumstances or a mitigating [551] circumstance is proved, his sentence must be life imprisonment. Therefore, the defendant, when confronted with whether or not to make the choice, is, I think, on balance, more likely to say, "Well, if I can persuade one of the three, it is a lot easier than persuading one, so I waive my right to a jury and elect to go before a three-judge panel."

This is not specifically considered by the Supreme Court, but certainly other decisions, which have held that any time you qualify a man's right to a trial by jury or make him undergo such an out-moded exercise, you violate his rights, and it must necessarily be unconstitutional.

Thank you.

MR. WHALEN: If it please the court, defense argues that there is no section now under our new statute for mercy, and yet when they refer to the judges hearing this particular hearing, they make the remark about if you find mercy.

I submit while the words may not be in there, as defense counsel has acknowledged, mercy is part of the new statute.

Notwithstanding a model penal code and notwithstanding what the State of California does, the Supreme Court of the United States upheld the death penalty to be unconstitutional in Furman versus Georgia. As a result of [552] that the State of Ohio Legislature changed

its statute. It is now in the form that it now exists under Amendment House Bill 511.

And I submit to the court that under the laws of our state and our country the statute as it exists now is presumed to be constitutional. There is no showing of anything in this motion that it is not. The fact it may have had it or deleted parts of it in the Model Code, the fact that it is not what California is doing, does not mean it is unconstitutional, and I submit the statute as it now exists is constitutional.

JUDGE KEEFE: Anything further?

MR. HOEFLE: Nothing further.

JUDGE KEEFE: Has your witness arrived yet?

MR. CROWE: One moment, your Honor.

No, he hasn't, your Honor.

JUDGE KEEFE: The court will take a brief recess. We do ask all involved to be available again in ten or fifteen minutes.

We will stand in recess for a few minutes.

(Short recess.)

MR. WHALEN: Your Honor, before I call the next witness, I wish to thank the court for its indulgence in this matter.

I call William Dunn.

[553] WILLIAM DUNN

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHALEN:

Q. Would you state your name and spell your last name, please?

A. William Dunn, D-u-n-n.

Q. How are you employed?

A. Detective with the Cincinnati Police Department Homicide Squad.

Q. How long have you been with the homicide squad?

A. For the past six years.

Q. How long have you been with the Cincinnati Police Department?

A. Twenty-three years.

Q. As part of your official duties as a detective of the homicide squad, on October 23, 1974, at approximately 5:20 p.m., did you take a statement from one Samuel Hall?

A. Yes, sir, I did.

Q. Is this in reference to the killing of Julius Graber?

A. That is correct.

Q. During this statement did Samuel Hall tell you who actually pulled the trigger of the shotgun?

MR. HOEFLE: Objection.

JUDGE KEEFE: Why?

[554] MR. HOEFLE: Perhaps it is premature.

JUDGE KEEFE: Are you withdrawing it?

MR. HOEFLE: Yes, your Honor.

A. Yes, sir, he did.

BY MR. WHALEN:

Q. And who did he tell you pulled the trigger of that shotgun?

MR. HOEFLE: Objection.

JUDGE KEEFE: Overruled.

A. He stated that Willie Bell, his partner, actually had pulled the trigger.

BY MR. WHALEN:

Q. Did Samuel Hall ever tell you that he, Samuel Hall, in fact, pulled the trigger of the shotgun that killed Julius Graber?

MR. HOEFLE: Objection.

JUDGE KEEFE: Overruled.

A. No, sir, he did not.

MR. WHALEN: I have no other questions.

CROSS-EXAMINATION

BY MR. MECHLEY:

Q. Officer Dunn, are you aware of the over-all investigation that was conducted in the murder of Julius Graber?

A. Yes, sir.

Q. Were you involved in that investigation?

[555] A. Yes, sir, I was.

Q. Are you aware of the fact that on October 22 or some two days—or one day, the day before the statement you took—a statement was taken of Samuel Hall by Detective Albert Williamson and Detective Charles Rutledge?

A. Yes, sir, that's correct.

Q. Have you read that statement?

A. I have listened to it, yes.

Q. So you are familiar with the fact that in that statement he accuses everybody from Buzz Lukins to three or four other people as to having wasted the old man; is that correct?

A. Yes, sir, he named several people.

Q. That is correct. And so that it would appear that as the days go on he gets more truthful?

A. That would be hard to say.

Q. You are not sure whether he has told the truth yet; is that what you are telling us?

A. I have no opinion on that.

Q. O.K. Would you have any opinion as to whether Samuel Hall or Willie Bell shot the old—shot Mr. Graber?

A. No, sir. I couldn't form an opinion as to who actually pulled the trigger.

MR. MECHLEY: No further questions.

JUDGE KEEFE: Anything further, Mr. Prosecutor?

[556] MR. WHALEN: No, your Honor.

JUDGE KEEFE: All right, Mr. Dunn. You may step down.

(Witness excused.)

MR. WHALEN: Your Honor, the state has no other witnesses.

JUDGE KEEFE: All right. Anything further for the defense?

MR. HOEFLE: No witnesses, your Honor.

JUDGE KEEFE: All right. The submitted motion for an order declaring death penalty unconstitutional, et cetera, is overruled.

Now, gentlemen, counsel for the state and counsel for the defense may now make whatever statements or argument they want to the court relative to penalty.

MR. HOEFLE: Your Honor, just to get the rules straight, before we start, it is my understanding, since we have the burden of proof, we will have the privilege of opening and closing.

May it please the court, members of the prosecution, Mr. Mechley, Mr. Bell.

Under Section 2929.04 of the Revised Code, it is incumbent upon the defense to prove by a preponderance of the existence of one or more of three facts and if those facts are proved to your satisfaction by a pre- [557] ponderance of the evidence, then Mr. Bell's life will be spared.

The first of these facts would be that Mr. Graber induced or facilitated his own death. We do not contend that he did. This is sort of, I think, an illusoriness in any aggravated murder situation, under the elements of that crime, that any victim would induce or facilitate his own death.

The other two are that it is unlikely the offense would have been committed but for the fact that Willie Bell was under durress, strong provocation and, third, the psychosis or mental deficiency, though the condition is insufficient to establish the defense of insanity.

Section 2929.03(E) indicates that in its consideration the court must consider the report from the psychiatrists and the probation department, the testimony, other evidence—whatever that means—statement of the offender and arguments of counsel. So, therefore, we feel that the arguments of counsel, if not equal, at least are considered to have some weight, unlike in a regular trial.

Now, on fear and coercion, Willie told you that Hall had the gun, that he was afraid. He was not afraid of Hall, he told the psychiatrists personally—he had no reason to be—till that sawed-off shotgun came out, and that, I would submit, would be all the reason for anyone in [558] the world to be afraid, in the proximity to Samuel Hall or, indeed, anybody else in possession of a loaded, sawed-off shotgun.

I think the state commented in its final argument in the trial about the purposes to which a sawed-off shotgun could be used. It is to kill people or to hurt people. And I think Willie was as subject to fear as Mr. Graber himself, perhaps somewhat less, since Hall had not directed it at him, but, at least, there was apprehension and fear.

Now, in respect to mental deficiency, the code does not define mental deficiency. It doesn't say what mental deficiency is. So under the statutes we must give it the normal, everyday useage. There is a statute that says unless otherwise defined words are to be given that.

Now, I remind the court of another statute that provides in criminal cases that statutes must be construed favorably to the accused, if there is any question. We have had recourse to Black's Law Dictionary to try to come up with a definition of mental deficiency, and we have come up with a lack or shortage or insufficiency relating to or existing in the mind, intellectual, emotional, or psychotic, as distinguished from bodily or physically.

Now, the first thing we must consider is the fact of Willie Bell's minority. When I speak of minority, I don't speak of race, I speak of age. The evidence is [559] uncontroverted—Mrs. Bell testified—that he was born on December 27, 1957, which would place him at the age of 16 years and some months at the time Mr. Graber was killed.

Now, the law has special provisions for minors, and what does the law call the condition of being a minor? Interestingly enough, it calls it a disability. A normal, average young man—we think of disability as someone being disabled, usually physically, and often mentally,

but it is considered by law a disability, and that is a legal term. Since this disability applies to all minors, we feel that an argument can be made and should be made that the mere fact that Willie Bell is 16 in itself is sufficient to permit this court to find a mental deficiency. It is not physical; it must be mental. There is no evidence of physical disability. The law says he is under a disability; therefore, it has to be mental.

Minors are not considered by the law to be as intellectually or as emotionally mature as adults, and it has made special provisions for them. This being so, the law holds that minors are mentally lacking and insufficient in relation to adults. For example, just a few—I was going to read every citation to you in the Revised Code by number where a minor is especially provided for, but we would be here until 3 o'clock.

[560] A minor cannot sue unless an adult does so as a next best friend. There are exceptions to that now with the reduction of the age to 18 for divorce, but generally a minor must sue by and through a next best friend and a next friend is a responsible adult. If, instead of suing someone, he is sued, a guardian ad litem must be appointed by the court. An adult if he wants to hold certain occupations—there is a whole chapter of the Revised Code, 4109—it indicates what occupations he may not participate in.

Now, we will concede that some of those are possibly based on the physical nature of young people rather than their mental or emotional state. A minor's contract is voidable by the minor, not by the adult with whom he deals. Why? Because they feel, and I think the law feels, that a minor is mentally deficient, or the possibility exists, at least, that he may make a contract which will be to his detriment and that he shouldn't be forced to deal with adults, because he is not intellectually and mentally equal to them.

A minor may not vote. He may not make a will. He may not serve on juries. He may not marry without an adult's permission. And again these qualifications and problems do not arise because of any particular minor's

physical disability; so, therefore, it must be because [561] the law considers a minor to be mentally deficient.

In criminal prosecutions a whole court system is set up, and the theory, as Judge Schwartz has said, is that Juvenile Court is to protect the minor, the offender. Exception is made in certain crimes for a child to be prosecuted as an adult. That happened here. But we submit the Revised Code sections of aggravated murder are adult sections and, likewise, the penalty section, and likewise the section that says mentally deficient. This is mentally deficient as an adult and we submit that a minor is, based on adult standards in the Revised Code, mentally deficient per se.

So the law recognizes that all minors are insufficient, lacking in intelligence, maturity, judgment, what-have-you, that doesn't put them on an equal footing with an adult.

You will recall in the argument on the motion we cited the California statute. They are protected, minors, from execution no matter what the crime or what the nature of it is. So we feel that Willie's minority, his youth at the time of the offense in itself necessarily is a mental deficiency within the meaning of all the Ohio laws, including this section providing for mitigation: that this disability upon proof of Willie's date of birth, which was uncontroverted and proved to a certainty, constitutes unrebuttable establishment to a preponderance of that [562] particular contention, that his minority itself is a disability and a mental deficiency. But the evidence did not stop there, and we brought evidence in, witnesses, to see whether or not we could show the court, and I think we did, that Willie is not only mentally deficient by virtue of his youth compared to an adult, but he is mentally deficient compared to other teen-agers as well.

Now, when we talk about mental deficiency, again, we are going not by the particular mental terms, but we are going by the average, everyday youth. I would assume that we can agree that there is a range of normality, and if you do not fit within that range of normality, you are deficient. You are either normal or you are not. There

is no such thing as being above normal—in the context of intelligence, perhaps, but not in the context of being mentally, emotionally mature. You are mature or you are not. You are either emotionally mature or you are not. Again, you may be above normal intelligence but you are not of normal maturity and stability, as, again, Black's Law Dictionary says, we are talking about an insufficiency.

Now, the Willie Lee Bell who is out there with Sam Hall on October 16, 1974, was under the influence of drugs. We heard evidence that was uncontroverted, that for approximately three years preceding the date of his [563] arrest, Willie was stoned on one thing or another. For a whole year, every day, he sniffed glue, and the way glue is sniffed, it is put in a paper bag, fumes are collected, then they are inhaled. The medical effect of it is to eat the brain away or dissolve the liquid, separating the brain tissue, and that didn't satisfy him. He went on to other things—uppers, downers, marijuana, sometimes, as he said, a combination, and he told the psychiatrists, "The best thing in my life that ever happened to me is when I'm high."

Now, we know from the teachers that he was stoned every day in school. His attendance was regular, so they did have an opportunity to observe him, and, when the state asked, I believe, two of the teachers, "Well, when was the last time you saw him," implying that Willie had dropped out of school sometime before, which was true, "which was the last time you saw that he was stoned," well, it happened to be during the week between Mr. Graber's killing and Willie's arrest. So this condition continued all the way through. We don't just have to take Willie's word for it, because the teachers saw it every day and they saw again even afterwards. He was under the influence of drugs.

Now, we have to consider two things about these drugs: No. 1, is he mentally deficient when he is on [564] drugs? And the evidence is, I think much more than a preponderance and uncontroverted that he is mentally deficient when he is on drugs; plus we have to consider the reasons that drove him to take drugs in the first place, and

that is his emotional problems. Is someone who is not mentally deficient likely to sniff glue every day for a year and thereafter take drugs, pills, marijuana, LSD, every day for the next two years, until he is physically prevented by his arrest and incarcerated from doing it?

That is a mental deficiency, too, whatever it takes to drive somebody to do that and put their mind chemically in such a state that they can hardly be said to be anything other than mentally deficient, when they are under the influence of the drug.

Now, we submitted Miss Ratliff's report from the Board of Education. This is back in 1972. We expected the state to comment on the time-gap there, but that was within the time when Willie was also on drugs. That examination was made when he was stoned, because he said he got stoned every day. The evidence from other people is that he did, also.

So the Willie Bell that took that test was in the same mental condition, we submit, as the Willie Bell that went with Hall and took Mr. Graber out to the cemetery and [565] stood there while Hall went back and slaughtered Mr. Graber.

He was depressed, he associated with older boys, many men he met on the streets, he had no father influence at home, and apparently he had the intelligence but not the ability to handle his problems. He couldn't, especially under drugs, realize dangerous situations. The psychiatrists indicate that in their first report, modified-diminished response to the seriousness of the situation. Again, this was after the arrest. Doctor McDevitt indicated himself that he was different the second time from the way he was the first time. That is the Willie that is a lot closer in mental ability or lack of it to the one that went with Hall on October 16. There was indicated in the probation report a lack of emotional stamina, a lack of positive personality attributes present in Willie, so that he followed the path of least resistance, with Sam Hall as with anybody else. The teachers said that he didn't give them a bad time. He was compliant, complacent, came to school stoned, very manipulateable.

Again, you don't get to McMillan Center if you are normal; if you are a student, you don't get there if you can adjust. You don't get there if you are emotionally secure. You get there only after you have given them [566] enough trouble that there is no place else to put you. So they put him in that context, in classes where there are, instead of 30 or 40 that we are used to, maybe 10 or 12 students, and even then what did he do? He didn't cope; he just slept or sat. He admitted to two of the teachers you heard that he took drugs. And I think by the nature of their calling and where they teach they know a drug user when they see one. They see a lot of them. They have also seen a lot of normal children in their years of teaching. They unanimously felt that Willie, even as to his own environment group and peer group, was less mentally equipped than the average, and, compared to an adult, even much more so than an adult.

And remember again that this is an adult statute we are dealing with, and I think when we talk about deviation from the norm, such as to consist or constitute a mental deficiency, we are talking about deviation from an adult.

He testified or told the court—and also the doctors the first time—that he was high on the night of October 16. He has been high, really, for the last three years of his life. At the trial the state's opening statement indicated a scenerio about what the state said that it was going to prove beyond a reasonable doubt really happened out there—and I won't go through the details of it, but I think, as I argued in closing argument, the purpose [567] of this was to convince your Honors that Willie Bell was a cold-blooded animal who participated in the actual physical act of killing Mr. Graber.

Now, we heard the evidence and Doctor Jolly's testimony, and I think just about two answers demolished that theory completely. There was no evidence to prove that Mr. Graber was running. In fact, when he was wounded by the first shot, the evidence indicated that it could not have happened that way. As to the bruises, which the

state apparently felt necessarily involved Willie, the doctor indicated he didn't know how they got there. He could give no theory, and we submitted at that time that those bruises were occasioned when Mr. Graber was bouncing around in the trunk of that car.

So we feel, in summary, judging Willie as he is now and as he was on the night of October 16 against the requirements of the statute that we have carried the burden of proving to a preponderance that Willie Bell was mentally deficient on that night for a number of reasons: No. 1, his age; No. 2, the use of the drugs; and also that that contributed, as did his fear of Sam Hall, in his participation in this offense. His participation, such as it was, was a passive thing, the act of a young man who ended up looking up to the wrong type of older man, the wrong time of ideal, and went along with him, stoned [568] on drugs, a participant, and I think we can see from the psychiatric report, too, from especially Doctor Seymour's comments, that it was likely he was just an observer in his mind. He was so divorced from reality—he knew what was happening after it happened, perhaps, but he did not participate.

So, in summary, we feel that his youth itself, plus the fact that he was stoned on drugs at the time, as he had been every day for the prior three years, his general immaturity, constitutes proof to a preponderance of a mental deficiency, and that the decision of the court should not be death but life.

Thank you.

MR. WHALEN: If it please the court, defense has given you numerous reasons why a 16-year-old is incapable of functioning in the adult world, and they stated that he cannot be judged on equal footing with an adult, and they gave a number of examples.

Well, I submit to the court that this was not a contractual relationship that Willie Lee Bell had with Julius Graber. Perhaps in that kind of atmosphere he would not be on equal footing. We are not talking about the ability to go out and buy alcohol or to file suit. We are talking about placing a man in a trunk of an automo-

bile and taking him out to a cemetery where he was shot [569] with a shotgun. And I am sure it was some consolation to Julius Graber to know that the man that was accomplishing this was under some disability as has been described. I have searched and searched and have found nothing that says a 16-year-old cannot fire a shotgun into another human being or that he is not responsible.

We have heard a great deal about the special treatment he received because of his age and the pre-sentence investigation on Page 9 indicates the previous contacts that this defendant had with the Juvenile Court and it ends up by saying, "This occurred without preceivable alteration of his behavioral pattern."

We have heard talk before about the father figure that the court is supposed to represent. In fact, the court upheld that position. Willie Lee Bell was taken to Juvenile Court and a mental examination and a physical examination was done. His record was examined. It was only after these that the court determined that Willie Lee Bell should be treated as an adult and he was sent to this court.

He has been described as a man that was constantly stoned on drugs, and, yet, I submit that none of the testimony that the court heard today indicated that.

There has been indication that he used narcotics or he used drugs, but it was to the extent that when one [570] teacher picked him up when he was hitchhiking she was so concerned about this poor man's condition—or poor boy's condition—that she immediately did nothing more than drive him home.

The report of Shirley Ratliff, the school psychologist, on this poor boy—as the defense describes him as glue eating his brains away—the recommendations on the report that are before the court are two. One of them is that a conference should be held to provide him with the knowledge—or to provide him able to conform to expected school behavior. And the second one is his greatest needs appears to be a personal involvement with an individual who would be firm, constant and sincere.

Now, this is a poor man who is under a great disability, who is unable to conform, and yet these are the two recommendations that the psychologist makes.

Under the three sections that 2929.04 of the Ohio Revised Code sets out—the defense has already stated the first one—the victim of the offense induced or facilitated the crime. The defense has already said they are not concerned with that.

The second is that it is unlikely that the offense would have been committed but for the fact that the defendant was under durress, coercion or strong provocation.

[571] Willie Lee Bell told the psychiatrists that he was not afraid of Samuel Hall. And if the court gives any credence to the fact that there is a possibility that he was under a coercion here before the court, I will ask the court to consider that this man, less than 24 hours later, duplicated this same act in Dayton, Ohio, and there was certainly sufficient time for this man to leave that particular environment, if there was any fear.

As a matter of fact, he stated to the one probation officer that he liked Sam Hall's style; he enjoyed it.

The third thing that the court is to consider is that the defense was primarily the product of the defendant's psychosis or mental deficiency. We have had three experts submit a report to this court and their finding unequivocally was that they could find no product of psychosis or mental deficiency that caused this particular crime.

I think the defense summed up the situation when they stated that Willie Lee Bell cannot adjust, he never has and he never will. And they tell you that we want to paint this man as a cold-blooded killer. I can't believe this court can recall the evidence in the medical testimony without feeling that, indeed, it was a cold-blood animal that took Julius Graber's life. I don't think this court or any court or any other people will know exactly who pulled that trigger, but I will submit [572] that Samuel Hall has given several statements to the police and he has never said that he pulled that trigger. The closest he ever came was twice when he said

once, "Tell Willie Bell not to say that he pulled the trigger," and the next time, "Tell Willie Bell to say it wasn't me that pulled the trigger."

He indicated to the police that this was the man that pulled the trigger on the shotgun that took Julius Graber's life. This man has been described as a passive participant and that term has been used time and time again.

I submit to the court that that is like being a little bit pregnant. You can't possibly be a passive participant. You are either a participant or you are not.

The court recalls the testimony of the witness as to the position of these men in the automobile and that both of them were out of the automobile. There was no passive participation—not even Julius Graber who was begging for his life at the time out there at the cemetery.

I submit to the court when they take all this into consideration there is only one finding, that there has been no proving beyond a preponderance that any of these three criteria exist and only the maximum penalty is justified.

[573] Thank you.

MR. MECHLEY: May it please the court, just briefly, I would like to restate for the court something that I am sure all three members of the panel know better than I do. We are effectively in a civil proceeding at this moment, to the extent that the statute prescribes that we have the obligation of establishing by a preponderance of the evidence one of the three matters that have already been discussd by Mr. Hoefle and by the prosecutor, Mr. Whalen.

I simply wish to point out that while this has criminal aspects to this, the original case keeps coming up. We are in a civil situation at this point for the purposes of establishing this, and a preponderance simply means the greater weight of the evidence. I think that is important, because it has been my observation after some years that certain feelings tend to persuade a court room, whether it be on behalf of the jury or the jurists or the judges themselves and counsel.

I would hope that we understand that that is the burden here; that what we are talking about at this time is not what it takes to find him guilty in terms of the crime itself or whether or not the prosecution was successful in doing that—that is not given at this point. The court has given its ruling on that.

What we are talking about is by the greater weight [574] of the evidence will this man live or die, and that is where it is at, and I think we should keep our sights at that, because whether or not Willie was able to keep his sights on that at the time of Julius Graber's death is hardly an argument as to whether or not you three men should keep your sights on it or whether or not I or the prosecutors should keep our sights on it. And it appears that emotional arguments at this time is ill advised—if the system is to work at all and if we are talking about the potential of evils. To argue that because one man is evil, therefore his system should practice an evil heart is a little ludicrous, and, hopefully, beyond our system and beyond our age.

If there is any chance this sentence is cruel and unusual, I think it behooves the court to give every possible consideration to every fragment of evidence that the court has heard, even as, I think, the statute suggests these arguments for the purposes of seeing to it that, if possible, the evidence preponderates along those same lines.

I think Mr. Whalen even knows as well as I that the statute says the arguments are to be given equal credence with all the other evidence. He has not once told you that Willie Lee Bell pulled the trigger. He skirted around it. [575] He said nobody can tell you who did that. He said a lot of things, but he never once told you that he personally believes that Willie Lee Bell pulled the trigger.

There is a very important reason why he hasn't told you that, because he personally doesn't believe it, and I think that is important. It is just a shame that we have to do these things by negatives.

As to being a passive participant, both he and I have been passive participants whenever the court overruled one of our motions. He understands as well as I do what

passive resistance is, and it is possible to passively resist—

MR. WHALEN: I hate to object, but I wish counsel would quit giving me credit to what I know and don't know and limit his argument to this particular issue.

MR. MECHLEY: One can be found guilty to being a passive participant, but that does not mean one has to be sentenced to the electric chair for being a passive participant.

As to the recommendations he read you from the report, as is often the case, he failed to read—as where the conference is recommended, it says—and I will continue the quote for you—"and others to determine what changes, if any, have occurred by that time and what the school can provide to enable to conform to expected school behavior," [576] as to his present need, and added at the end, "A teacher, school counselor, big brother, or interested community member could possibly fill this role."

And, of course, all that has been suggested, to some extent, by the psychiatrists, and to some extent by the probation report and to some extent by Mr. Hoefle, that that was the role, unfortunately, Mr. Hall was fulfilling at the time of the commission of this crime.

Relating to that now, that is the time that this court has to consider in evaluating Willie. It is what he was like then—not what he was like right now, but what he was like then.

I submit to the court that the most important evidence on that aspect is the evidence that leads up to that position, the evidence that brings you forward and, in a chronology of events, are best described by the people around him around that date.

Saint Thomas has told us that we know a thing by what it does, and I think every member of this panel—and perhaps every person in this courtroom—evaluates a person on the basis of his past performance as it comes forward to that moment in time in which they have to make a judgment. Unfortunately, you jurists are asked to evaluate a man that sits in front of you from a point in time before the crime to a point in time of the crime by [577] things that have been submitted to you since the

crime—a difficult posture to say the least and one, in my estimation, gets muddy in the minds of the jurists who look at a man who has been cleaned up, dried out, and fed for approximately 90 days, in a manner that has not been accomplished in his entire life.

I submit to you if you are going to evaluate this young man as he stands now or as he was evaluated a few weeks before December 30, you are going to miss the mark by a wide, wide margin.

I submit to you if you are going to sentence Willie Lee Bell to die in the electric chair, you should sentence the Willie Lee Bell that was present that night in the cemetery with Julius Graber; you should sentence the mind that was emotionally deficient at that time, not the mind that is perhaps still most insufficient. And that mind was best described, in my estimation, by the three teachers who came here for no particular reason, with no particular axe to grind, and by no particular person of any particular power. They said they had known Willie Lee Bell for some year and a half. They said further they could hardly think of the day—and I don't know where the prosecutor heard anything else—that they couldn't think of a day that he wasn't stoned or under the influence of drugs.

[578] These teachers vary in ages from 27 years to 41 years of age, and they are teaching at a special school, for a school of emotionally deprived children. I think you can take judicial notice that teachers in schools such as that are special teachers themselves. I submit to you they had a chance to observe Willie Lee Bell, and it is something like a snowball going downhill, wishing you could do something about it, but wondering what you are going to be able to do about it, except to guide it so it comes crashing down the valley without ruining anybody or hurting anybody. They described Willie as constantly down, constantly depressed, constantly influenced, constantly willing to react, either with no actions whatsoever or along the lines he has been directed by a person at that given time.

They seem to be talking about a different person here. There was some difference that Doctor McDevitt eluded to between the Willie in December and the Willie in January and the information provided by the teachers, and I heard them testify here today and I said to myself, "How in God's name can we be talking about one person? It sounds like two separate individuals. How can we have this huge discrepancy? How can we have this dicotomy in personality?"

Nobody has ever suggested he is a schizophrenic or [579] schizoid personality. How can we have it?

I think it is obvious, and I think Doctor McDevitt eluded to it, it is the presence and absence of drugs; it is drug dependency in light of an existing emotional instability in a 16-year-old boy.

Now, you have no guidelines, no definition, but you do have law—or Black's Law Dictionary, for whatever good that is, and Mr. Hoefle has told you what it says about mental deficiency. It speaks of mental in not being physical, in being emotional or being intellectual. I suggest to you, therefore, that where it says a mental deficiency is a shortage or insufficiency in the mental area —not in the physical area, but in the intellectual or emotional area—it is talking about a shortage or insufficiency of emotional ability to correspond to the age of the person that we are dealing with. We have here, then, a mental or—I'm sorry, an emotional shortage or an emotional insufficiency, and whose words are, ideally, transferable, according to Black's Law Dictionary, and if that is true, that is what we are talking about.

Unfortunately, Doctor McDevitt told you they did not concern themselves the second time around with the drug problem. Why they didn't, I don't know, but they chose not to.

I submit to the court that that is a very, very, [580] very important aspect of this case. So important that it seems to me, if we are going to put Willie in the electric chair, we ought to fill him full of grass and Mescaline before we electrocute him so we are absolutely certain we are electrocuting the man who was involved in whatever manner with the death of Julius Graber.

Thank you very much.

JUDGE KEEFE: This court will consider the reports and the testimony and the other evidence, the statement of the defendant and arguments of the lawyers for the defendant and for the state, all of which have been developed in this morning's hearing.

The court expects to pass sentence sometime later today and due notice will be provided.

Mr. Harris, will you adjourn court for the morning.

(The case was continued in progress until the afternoon of the same day.)

[581] AFTERNOON SESSION

JUDGE KEEFE: Will you have the defendant come before the court, please.

Now, Mr. Defendant, I remind you that you have been found guilty of aggravated murder, aggravated robbery, and kidnapping, as charged in the indictment.

Although you made a statement in this courtroom a few hours ago, this court now wants to inquire if you have antyhing to say as to why sentence should not be pronounced against you, if your attorneys have anything to say as to why sentence should not be pronounced against you, or anything else that you want to say or anything else that your lawyers want to say at this time.

DEFENDANT BELL: No, sir.

MR. HOEFLE: No, sir.

MR. MECHLEY: Nothing, your Honor.

JUDGE KEEFE: This court sentences Willie Lee Bell, upon his conviction of aggravated robbery, as charged in the third count of the indictment, to the Ohio State Penitentiary, to serve a minimum term of seven and a maximum term of twenty-five years.

The defendant, Willie Lee Bell, on the fourth count of the indictment, is sentenced to the Ohio State Penitentiary, for commission of the crime of kidnapping, to serve a [582] minimum term of seven years and a maximum term of twenty-five years.

The sentences for the aggravated robbery, third count of the indictment, and for the kidnapping, fourth count of the indictment, are to be served consecutively.

This panel of three judges unanimously finds none of the mitigating circumstances listed in Division B of Section 2929.04 of the Ohio Revised Code has been established by a preponderance of the evidence. Therefore, it is the unanimous sentence of this court that you, Willie Lee Bell, be taken to the jail of Hamilton County, and within the next thirty days delivered by the sheriff of Hamilton County to the warden of the Ohio Penitentiary; that on the eighteenth day of July nineteen hundred and seventy-five the said warden shall cause a current of electricity of sufficient intensity to cause death to pass through your body until you are dead, all this in accordance with Ohio law.

Willie Lee Bell, you have a right to an appeal. If you are unable to pay the cost of an appeal, you have the right to an appeal without payment. If you are unable to obtain counsel for an appeal, counsel will be appointed without cost. If you are unable to pay the costs of documents necessary to an appeal, such documents will be provided without cost. And you have a right to have a [583] notice of appeal timely filed on your behalf.

It is assumed that there will be an appeal, and this court appoints the present counsel for the defendant to file the required notice of appeal and also immediately to present to this court an entry appointing present counsel as appeal counsel.

This court will stand adjourned.

(End of proceedings.)

D. OPINIONS BELOW

OPINION OF THE SUPREME COURT OF OHIO
REPORTED AT 48 OHIO ST.2d 270,

358 NE2d 556

THE STATE OF OHIO, APPELLEE

v.

BELL, APPELLANT

[Cite as State v. Bell (1976), 48 Ohio St. 2d 270.]

Criminal law—Aggravated murder—Imposition of death penalty—Waiver of jury trial—R. C. 2929.03(C)(1), (2) and (E)—Constitutionality—Mitigating hearing—Relevant factors.

1. A defendant is not coerced or impelled to waive his constitutional right to jury trial by R. C. 2929.03 (C)(1), (2) and (E), under the provisions of which an offender who waives a jury trial need persuade only one member of the three-judge panel at the mitigating hearing to avoid imposition of the death penalty.

2. Relevant factors such as the age of the defendant and prior criminal record are among those to be considered by the trial judge or three-judge panel in determining whether the existence of a mitigating circumstance pursuant to R. C. 2929.04(B)(2) and (3) was established by a preponderance of the evidence.

(No. 76-499—Decided December 22, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

On October 16, 1974, at about 11:00 p.m., police discovered Julius Graber lying in the woods in Spring Grove Cemetery in Hamilton County critically injured from a shotgun wound to the back of his head. He was pronounced dead on arrival at the hospital.

Approximately one week thereafter, Willie Lee Bell, defendant-appellant, was arrested for the murder of Julius Graber. Samuel Hall, Bell's companion, was arrested the day after Graber's body was discovered. Bell was then a minor of 16 years of age, and Hall was an adult. Following proceedings in the Juvenile Division of the Court of Common Pleas, Bell was bound over to the Hamilton County Grand Jury and was indicted jointly with Hall on two counts of aggravated murder, under R. C. 2903.01, with specifications of aggravated robbery and of kidnapping pursuant to R. C. 2929.04(A)(7). Bell entered pleas of not guilty and not guilty by reason of insanity.

Bell and Hall were tried separately. The trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress any inculpatory statements, and accepted Bell's waiver of trial by jury and requested to be tried by a three-judge panel.

The record tends to reveal the following series of events. On October 16, 1974, Bell and Hall went to a community center in Cincinnati, following which they went to Hall's home to borrow his brother's Grand Prix Pontiac automobile. In that car, Bell and Hall proceeded to Victory Parkway, where they observed a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, and followed it to the second level of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 20-gauge "sawed-off" shotgun and accosted the Chevrolet's driver, 64-year-old Julius Graber. Graber was forced into the trunk of his own vehicle, and Hall drove that car, with Bell following in the Pontiac, and parked it near his home. Bell parked the Pontiac at Hall's home, and then drove Graber's Chevrolet toward Spring Grove Cemetery. After driving past the cemetery,

Bell stopped, reversed direction, and then backed the car into a lane that went inside the cemetery premises.

At this point, Robert Pierce, Jr., a resident of an apartment building near the cemetery, had just returned from work and was sitting in the parking lot of the building listening to his car radio. Pierce observed a vehicle stopped in the cemetery with its parking lights on. He heard two car doors close, one after the other, turned his radio down to listen, and then heard a voice plead "Don't shoot me. Don't shoot me." Pierce turned his radio off, and shortly thereafter heard one shot, followed, after an interval, by a second shot. He then saw the interior light of the car go on, and a man enter the parked car on the passenger side and move behind the wheel. Pierce heard two car doors close, saw the interior light go off, and then watched the car leave the cemetery, without any lights. Pierce called the police, around 10:50 p.m., who subsequently discovered Graber.

Hall and Bell drove to Dayton, where they spent the night in the Graber Chevrolet. The following morning, Bell driving, they stopped at a service station to ask directions for finding work. After questioning the attendant, Bell and Hall left, but shortly returned. Hall then thrust a shotgun at the attendant, Kenneth B. Hardin, took the keys to Hardin's automobile, forced him into the trunk of his car, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman, and when Hardin pounded on the trunk lid, he was discovered and released by the officer. Hall was arrested, and the shotgun was found and removed from the car's interior. Meanwhile, Bell, who was still following, proceeded back to Cincinnati, abandoned the Chevrolet on Beatrice Avenue, and returned to his residence on Preston Avenue.

Approximately one week later, following the interrogation of Hall and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and was given his *Miranda*

warnings. When the answers to preliminary questions indicated a possible connection with Hall, Bell was again given his *Miranda* warnings. Approximately one hour later, Bell was given his *Miranda* warnings a third time on a printed "Notification of Rights" form, whereupon he signed the "Waiver of Rights" portion. Bell was asked to make a recorded statement, and was advised that he could have his mother present. Although Bell indicated that he did not want his mother present, the officer called Bell's mother to tell her that her son was involved in a homicide, a kidnapping and an armed robbery, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement, but she declined.

A recorded statement was taken from Bell which was eventually received in evidence. It confirmed most of the above factual details, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but claimed he was not aware of the shotgun until Hall got out of the Pontiac in the parking garage to threaten Graber with it. Bell conceded driving Graber's car to the cemetery and backing into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and that it was Hall who took Graber into the bushes. Bell said he then heard a shot and Graber pleading for his life. After the first shot, according to Bell's recorded statement, Hall ran back to the vehicle to get another shotgun shell and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove Bell to Dayton where the incident with the service station attendant occurred. In his statement, Bell attributed the active part of the incident to Hall, but admitted following Hall in Graber's Chevrolet for some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found in the car Hall was driving at the time of his arrest in Dayton, and also identified a

latent fingerprint from the outside window on the driver's side of the Graber car as being that of Bell's.

After Graber had been pronounced dead at the hospital, where attendants discovered that he had secreted money and other valuables in his shoes, his body was taken to the morgue. A post-mortem examination revealed that death had resulted from a wound to the rear of the head inflicted by a shotgun shell at near-contact range. Testimony established that the head and hand wounds Graber received were consistent with the theory that the fatal shot was fired while Graber's hands were clapsed behind his head.

The defense offered only one witness, a Columbus police officer who had interrogated and taken several statements from Hall. The statements were not, however, offered in evidence at the trial, and the case went to the panel on the basis of the evidence presented by the prosecution.

At the conclusion of trial, the panel unanimously found Bell guilty of aggravated murder as charged on the second count of the indictment, and guilty of the specification to the second count, that the aggravated murder was committed during a kidnapping. Bell was also found guilty of the third and fourth counts of aggravated robbery and of kidnapping, respectively.

Following pre-sentence and psychiatric examination a mitigation hearing was held pursuant to R. C. 2929.03, *et seq.* The panel found that none of the mitigating circumstances specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Bell was sentenced to 7 to 25 years on the kidnapping charge; to 7 to 25 years on the aggravated robbery charge, to run consecutively with the first sentence; and to death by electrocution on the aggravated murder charge.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court as a matter of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Robert Hastings, Jr.*, and *Mr. William P. Whalen, Jr.*, for appellee.

Mr. H. Fred Hoefle and *Mr. Thomas A. Luken*, for appellant.

PAUL W. BROWN, *J.* Appellant Bell raises ten propositions of law. The first three of these assert that Ohio's statutory scheme for the imposition of the death penalty is unconstitutional. That issue was decided by this court in *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, and need not be reconsidered here. Those propositions of law are overruled.

Appellant asserts in his fourth proposition of law that he was unconstitutionally coerced into waiving his right to trial by jury by the provisions of R. C. 2929.03(C)(1), (2) and (E) which provide that if a defendant is tried by jury and convicted, then the trier of fact at the mitigation hearing is the one trial judge who presided over the jury trial; but, if the defendant is tried by a three-judge panel following a waiver of a jury trial, then the trier of fact at the mitigation hearing is the same three-judge panel.

Appellant contends that this statutory scheme coerces defendants, and coerced him, into waiving their right to trial by jury. Before a three-judge panel can impose the death penalty, it must unanimously find that the defendant has failed to establish the existence of one or more of the mitigating circumstances enumerated in R. C. 2929.04(B). Thus, if tried before a panel, a defendant need convince only one judge out of three that such mitigation existed. If, however, a defendant elects a jury trial, he must convince the sole trial judge at the penalty proceedings that a mitigating circumstance existed. Appellant asserts that this scheme impels defendants to select trial by panel, rather than by jury, because the dread of the death sentence is an overwhelming consideration.

A statutory scheme which deliberately or unintentionally chills the right to trial by jury cannot constitutionally be tolerated. Appellant relies on *United States* v. *Jackson* (1968), 390 U.S. 570, in which the United States Supreme Court held that a federal statute had such an impermissible chilling effect because it allowed

the death penalty in kidnapping cases where trial was by jury, but did not permit the death penalty where trial was by the court.

However, unlike the statute in *Jackson*, the death penalty is possible under the Ohio statute under both alternatives, and it may be avoided under both alternatives. Thus, we are confronted with only the arguably greater possibility of the avoidance of the death penalty by the requirement of unanimity within the panel, and not with its absolute avoidance as in *Jackson*.

Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel.

As noted, this statutory scheme furnishes a choice for defendants. Presumably, if no choice were offered, coercion would not be alleged by appellant. We see nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all the proceedings. We see nothing objectionable in providing the defendant with a choice, absent, of course, an allegation of ineffective trial counsel. No such allegation was here made.

Further, the Court of Appeals concluded from statistics in Hamilton County that, in actual practice, this statutory scheme does not coerce or impel a defendant to waive jury trial. We are presented with no contrary evidence. Appellant's fourth proposition of law is overruled.

Appellant asserts in his fifth proposition of law that a statement by a juvenile cannot be used against him at trial unless both he and his parents or guardian was informed of his *Miranda* constitutional rights, and unless the minor was given the opportunity to consult with his parents, guardian or attorney as to whether he should waive those rights.

Appellant cites Indiana case law and apparently concedes that this proposition has no support in Ohio authorities. We decline his invitation to alter existing Ohio law. We perceive no requirement in *Miranda* that the parents of a minor shall be read his constitutional rights along with their child, and that, by extension, both parent and child are required to intelligently waive those rights before the minor makes a statement. Appellant's mother was given every opportunity to be with her son, and, after declining, her presence cannot be forced by police.

When a minor is sought to be interrogated, the question of whether he intelligently and voluntarily waives his rights cannot always be decided by the same criteria applied to mature adults. See *Haley* v. *Ohio* (1948), 332 U.S. 596; *In re Gault* (1967), 387 U.S. 1. Such criteria necessarily varies with certain factors as the age, emotional stability, physical condition, and mental capacity of the minor. Appellant was adjudicated competent to stand trial as an adult, and thus is not afforded as much protection as a very young or disabled child who is not as capable of intelligently waiving his rights.

We are impressed with the meticulous care with which the police approached appellant's rights. Appellant was advised of his rights three times, and, the last time, was asked whether he understood them. He indicated that he did, and signed a waiver of those rights. Appellant was informed further by the officer that he could have his mother present while making his statement, but he indicated he did not wish her present. The officer nonetheless phoned appellant's mother and informed her that her son was being held for involvement in a homicide, an armed robbery and a kidnapping, and asked further if she would like to be present when her son gave a statement. The officer offered her transportation to and from police headquarters, but she declined this offer along with the opportunity to be present at the interrogation. After

being informed of this conversation, appellant again declined to have his mother present when he gave his statement.

Upon review of the record, we find that the prosecution satisfied its burden of proving that the inculpatory statement by the minor appellant was made pursuant to an intelligent and voluntary waiver of his constitutional rights of which he was fully adviser, giving due regard to the requirement that a minor be given even more scrupulous attention to the issues of voluntariness and understanding than an adult. Appellant's fifth proposition of law is overruled.

In his sixth proposition of law, appellant asserts that a juvenile's statement is involuntary and may not be used against him if both he and his parents or guardian have not been advised that he may suffer the death penalty with the use by the prosecution of the statement, and if he and his parents or guardian have not been advised that he may lose the protection of the Juvenile Court.

We find this proposition without merit. Appellant has cited no authority from any jurisdiction that supports it. The officer related to appellant's mother all of his knowledge at that point: that appellant was being held in connection with a homicide, a kidnapping and an armed robbery. Any further advice by the officer concerning the death penalty or Juvenile Court would have been pure, and perhaps improper, speculation since appellant had not yet given his statement. Accordingly, the six proposition of law is overruled.

Appellant argues in his seventh proposition of law that one who participates in an armed robbery and a kidnapping is not guilty of aggravated murder where the other participant takes the victim out his presence and deliberately kills him, absent evidence of the first participant's purpose to kill, or that he aided and abetted the actual slaying with the intent that the victim die.

Clearly there is ample evidence that appellant affirmatively assisted and acted to complete the murder. Appellant's denial could be reasonably disbelieved after considering all relevant circumstances, especially that Hall

was arrested the next day with a would-be victim in the trunk and appellant following in another car, presumably attempting to carry out the same scheme of murder.

The foregoing evidence is sufficient to sustain a finding of guilt because, under R. C. 2923.03(A)(2) and (F), one who aids and abets another in committing an offense is guilty of the crime of complicity, and may be prosecuted and punished as if he were the principal offender.

But, in this capital case, this proposition need not be overruled solely on the above grounds. The panel was not required to accept appellant's version of the murder. As the trier of fact, it was within the province of the panel to determine which was the credible evidence. Thus, the gist of appellant's seventh proposition is that the conviction of aggravated murder was contrary to the manifest weight of the evidence. Upon review of the entire record, we hold that there was ample, credible evidence from which the panel could have concluded that appellant actively participated in the murder. Appellant's own statement confirms his involvement in the kidnapping and the armed robbery, and concedes further that, after he drive into the cemetery, he asked Hall what was going to be done next. The court could reasonably disbelieve, as we do, that Graber lay quietly with his hands behind his head while Hall left him alone to return to his car to reload his shotgun. Evidence of bruises on Graber's body, appellant's statement to police, the physical circumstances of the slaying, and the testimony of the eyewitness Pierce all would have justified the panel's rejection of appellant's version and its conclusion that Bell either committed, or actively assisted in, the murder. The seventh proposition of law is therefore overruled.

Appellant in his eighth proposition of law contends that where the prosecutor fails to advise the defense counsel of the names, addresses and criminal records of witnesses after proper discovery requests, the trial court should not permit those witnesses to testify over objection, or, alternatively, should grant motions to strike such testimony. This proposition is not well taken. The record shows that in most instances the prosecution did not have

such information, but orally communicated the information to defense counsel as it was acquired. The trial court carefully examined the possibility of prejudice to appellant, and concluded that no such prejudice existed. This proposition of law is overruled.

Appellant asserts in his ninth proposition of law that a minor is "mentally deficient" within the meaning of R. C. 2929.04(B) (3), and therefore cannot be sentenced to death after a conviction of aggravated murder with specifications. The Revised Code does not define "mental deficiency"; therefore, unless usurped by a judicial definition, the term must be accorded its common, everyday meaning, keeping in mind that the statutory language defining mitigating circumstances must be strictly construed against the state and liberally construed in favor of the accused. See R. C. 2901.04(A).

However, we do not agree that a minor is *per se* "mentally deficient" within the meaning of R. C. 2929.04(B) (3). Such an intention by the General Assembly could have easily been provided for by clear and simple language. Upon review of the statute, we do not believe the General Assembly intended that a 17-year-old defendant is conclusively "mentally deficient." The ninth proposition of law is overruled.

In his tenth proposition of law, appellant alternatively argues that even if a minor is not *per se* "mentally deficient," for purposes of R. C. 2929.04(B) (3), the circumstances of this case establish by a preponderance of the evidence that the offense was a product of his mental deficiency, and that the imposition of the death penalty was error.

In considering this proposition, we will not limit ourselves, as appellant has, to the mitigating circumstances of mental deficiency. R. C. 2929.04(B) states:

"Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and

condition of the offender, one or more of the following is established by a prepondence [*sic*] of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

The purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration for the individual offender and his crime. *State* v. *Woods* (1976), 48 Ohio St. 2d 127. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. *Williams* v. *New York* (1949), 337 U.S. 241, 247.

We will examine each of the three mitigating circumstances provided for in R. C. 2929.04(B) to determine if the evidence established that such a mitigating factor existed.

We need not spend much time or effort, though, in discussing R. C. 2929.04(B) (1) as there was no evidence whatsoever that the victim induced or facilitated the crime.

However, the two remaining mitigating circumstances merit consideration. It has been alleged that the mitigating circumstances under R. C. 2929.04(B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04(B) states that "the death penalty * * * is precluded when, considering the nature and circumstances of the offense *and the history, charac-*

ter, and condition of the offender" (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.

As used in R. C. 2929.04(B) (2), the terms "duress" and "coercion" are to be construed more broadly than when used as a defense in criminal cases. See *State* v. *Woods* (1976), 48 Ohio St. 2d 127.

There was evidence in the psychiatric reports that appellant was perhaps easily led by Hall. When combined with appellant's age, it is conceivable that all characteristics could establish the mitigating circumstances defined by R. C. 2929.04(B) (2). However, we believe the panel was justified and correct in finding that this mitigating circumstance was not established by the evidence. Even if it were believed that appellant was apprehensive of Hall and was "forced" to go along with the crimes, the hard fact remains that appellant could have very easily quit the scheme while following in another car. Further, it must be remembered that appellant and Hall were engaged in the same type of scheme the very next day when Hall was arrested. We agree with the panel that, after considering all relevant factors, the second mitigating circumstance was not established.

The third and final mitigating circumstance in the statute concerns the offender's psychosis or mental deficiency. While rejecting appellant's claim that a minor defendant is *per se* "mentally deficient," we do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency. Senility, as well as minority, may well be relevant, and therefore properly considered, in determining whether the offense was a product of mental deficiency.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities and others fails to sustain appellant's position that he suffered from a mental deficiency. Appellant's situation was unpleasant but not unfamiliar: an unsatisfactory home, absence of family or other supervision, drug involvement, and inability to cope with school demands. Even when considered together with defendant's minority, all the factors do not establish a "mental deficiency" for the purposes of R. C. 2929.04(B) (3). Although appellant's environment was indeed undesirable, such conditions do not excuse or even mitigate aggravated murder. To hold otherwise would set a dangerous and misleading precedent for future defendants. We therefore agree with the panel and the court below that the aggravated murder was not the product of appellant's psychosis or mental deficiency, and therefore overrule appellant's tenth proposition of law.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN, JJ; concur.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-75068

[Filed Court of Appeals, Apr. 12, 1976, Clerk of Courts]

STATE OF OHIO, PLAINTIFF-APPELLEE

vs.

WILLIE LEE BELL, DEFENDANT-APPELLANT

Appeal From the Court of Common Pleas
Hamilton County, Ohio

OPINION

PALMER, J.

At about 11:00 P.M. on the evening of October 16, 1974, Julius Graber was discovered by police lying in Spring Grove Cemetery in Hamilton County, Ohio, critically injured from a shotgun wound at the back of his head. He expired in the ambulance on the way to the hospital. Approximately one week thereafter, the defendant-appellant, Willie Lee Bell, then a minor of 16 years of age, was arrested together with one Samuel Hall, an adult, for the murder of Julius Graber. Following proceedings in the Juvenile Division, not here in issue, Bell was bound over to the Hamilton County Grand Jury and was jointly indicted with Hall on two counts of aggravated murder contrary to R. C. 2903.01, with specifications of aggravated robbery and of kidnapping, and on separate counts of aggravated robbery and kidnapping. Counsel was assigned the indigent Bell, and pleas of not guilty and not guilty by reason of insanity were entered.

In subsequent proceedings, the trial court found Bell to be sane and competent to stand trial, overruled a motion to suppress an inculpatory statement, and accepted Bell's waiver of trial by jury and request to be tried by a three-judge panel. Trial then ensued, separate from that of Hall, at the conclusion of which the court unanimously found Bell guilty of aggravated murder as charged in the second count of the indictment, and guilty of the specification to the second count, viz., that the aggravated murder was committed while Bell was committing kidnapping. He was also found guily of the third and fourth counts of aggravated robbery and of kidnapping, respectively. Following pre-sentence and psychiatric examinations, a hearing on mitigating circumstances was held by the panel pursuant to R. C. 2929.03 et seq., at the conclusion of which the panel unanimously found that none of the mitigating circumstances specified in R. C. 2929.04(B) had been established by a preponderance of the evidence. Sentence, including death by electrocution, was then pronounced and entered.

Appeal was timely filed, and counsel provided for appellant to prosecute this appeal. Nine assignments of error are presented, have been vigorously argued, and will be discussed serially *infra*, following a review of such of the evidence produced during the trial and antecedent proceedings as is necessary to provide a fundament for the disposition of the various questions of law raised thereby.

The record reveals a body of evidence adduced on behalf of the State, resulting from the testimony of some 20 witnesses and including the recorded statement of Bell, which tends to establish the following series of events. Earlier in the evening of October 16th, Bell and Hall had met at a youth center in Cincinnati to thereafter leave for Hall's home, where the latter borrowed his brother's Grand Prix Pontiac. After briefly stopping at a White Castle restaurant, the two proceeded to Victory Parkway, falling in column behind a 1974 blue Chevrolet. When the Chevrolet turned into a parking garage, Hall, driving his brother's car, did the same, to follow the leading vehicle to the second floor of the garage. After the Chevrolet was parked, Hall got out of the Pontiac with a 12 gauge "sawed off" shotgun and accosted the Chevrolet's driver, who proved to be Mr. Graber, the 64 year old director of the Glen Manor Home for the Aged. Graber was forced into the trunk of his own vehicle, and Hall drove their unwilling passenger, with

Bell following in the Pontiac, to Dana Avenue, where the Pontiac was then parked. Bell next entered Graber's Chevrolet and began driving it in the direction of Spring Grove Cemetery. At shortly before 11:00 P.M., Bell drove past an entrance to the cemetery, stopped and reversed directions, and backed the Chevrolet up a lane inside the cemetery premises.

At this point, one Robert Pierce, a resident of an apartment building on Groesbeck Avenue, near the cemetery, had just returned from work and was sitting in the parking lot of his building in his automobile listening to the conclusion of a baseball game. Through opened windows, he observed a vehicle stopped in the cemetery with its parking lights on. He then heard two car doors close, one after another, turned his radio down to listen, and heard a voice screaming "Don't shoot me; don't shoot me." He turned his radio off, and shortly thereafter heard one shot, followed after an interval by a second shot. He then saw a man enter the parked car on the passenger side to place himself behind the wheel. He heard two car doors closing, saw the parking lights extinguished, and watched the car proceed, without lights, out of the cemetery and onto Gray Road and away. At about 11:00 P.M. this witness called the police, who shortly thereafter discovered Mr. Graber, with the results heretofore related.

After Graber had been pronounced dead at the hospital, his body was removed to the morgue, where attendants discovered that he had secreted money and other valuables in his shoes. A post-mortem examination revealed that death had resulted from a wound at the rear of the head delivered by a shotgun held at near-contact range. Numerous pellets of #5 shot were removed from the body, and testimony was received that the wounds, to hand and head, were consistent with the fatal shot having been delivered while Graber's hands were clasped behind his head.

Following the fatal incident, Hall and Bell drove to Dayton, Ohio, where they spent the night in the Graber Chevrolet. The next morning, with Bell driving, they stopped at a service station in Dayton where they made

certain inquiries of the attendant, one Kenneth Hardin, about finding work. After conversation, Bell and Hall left, but returned following a short interval. Hall then thrust a shotgun at Hardin, relieved him of the keys to his automobile, forced Hardin into its trunk, and drove it away from the station. Bell followed in Graber's Chevrolet. The Hardin car, however, was stopped by a State Highway Patrolman for a defective muffler, and when Hardin pounded on the trunk lid, he was released by the officer. Hall was arrested and the shotgun removed from the vehicle's front seat. Bell, meanwhile, who still was following in the Graber Chevrolet when Hall was stopped, proceeded back to Cincinnati to abandon the Chevrolet on Beatrice Avenue (near his own residence on Preston Avenue) to which he then returned.

Approximately one week later, following the interrogation of Hall by officers of various police departments and other investigative effort, Cincinnati police appeared at the Bell residence. Bell was taken to police headquarters to answer questions in connection with the Hall investigation and, when the answers to preliminary questions indicated a possible connection with Hall, was given the first of several *Miranda* warnings. Bell was asked to make a recorded statement and instructed, in connection therewith, that he could have his mother present with him when he made any statement, if he so desired. Although Bell declined, the officer nevertheless called his mother to tell her that her son was involved in a homicide, kidnapping and robbery with Hall, and that he was going to be charged with the offenses. An offer was made to transport her to headquarters to be with her son when he made his statement. She declined to come to headquarters.

A statement was then taken from Bell, to eventually be received into evidence. It confirmed most of the factual details related above, but denied any intention of Bell to take part in a homicide. Bell conceded his presence during the kidnapping of Graber, but said he did not know of the presence of the shotgun until Hall got out of the Pontiac to threaten Graber with the weapon. He conceded driving Graber's vehicle to the cemetery and

backing up into the cemetery lane, but insisted that it was Hall who removed Graber from the trunk, and Hall who took him "in the bushes and I heard a shot and I heard this man crying, telling Sam, 'Don't shoot anymore.'" T. p. 340. After the first shot, according to Bell, Hall ran back to the vehicle to get another shell for the shotgun and then returned to the bushes, whereupon Bell heard the second shot. Hall then drove the pair, according to the statement, to Dayton where the incident with the service station operator occurred. Bell attributed the active part of these proceedings to Hall, but admitted following Hall in Graber's Chevrolet while the two vehicles were driven some 20 minutes before Hall was stopped by the highway patrolman.

Additional expert testimony identified a shell casing found at the scene of the homicide as having been fired from the shotgun found on Hall at the time of his arrest in Dayton, and identified a latent fingerprint from the outside window on the driver's side of the Graber vehicle as being that of Bell.

The defense offered only one witness, a Columbus police officer who had interrogated and had taken several statements from Hall. The statements were not, however, offered into evidence, and the case went to the panel on the basis of the evidence presented by the State.

I.

The first three assignments of error challenge the constitutional validity of the Ohio death penalty provisions, and are phrased as follows:

> I. Imposition of the punishment of death is in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, since it constitutes cruel and unusual punishment.
>
> II. The trial court erred in overruling the "Motion for an Order Declaring the Death Penalty Unconstitutional, Dismissing the Specification of Aggravating Circumstances from the Indictment and Sentencing Defendant to Life Imprisonment for His Conviction of Aggravated Murder."

> III. The death penalty to which appellant was sentenced offends contemporary standards of decency and constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The first two of these concededly raise questions which are for all practical purposes identical, were therefore argued together, and will be similarly treated here. Appellant urges, under these assignments, that the Ohio death penalty provisions failed to cure the infirmities found by at least three of the Justices constituting the majority of the United States Supreme Court in *Furman* v. *Georgia*, 408 U.S. 238 (1972) to fatally infect similar legislation and that the Ohio statutory scheme for the punishment of murder contained in R. C. 2929.02 et seq., enacted effective January 1, 1974, failed to eliminate those elements of arbitrary, rare, and discriminatory application which call down the prohibitions of the Eighth and Fourteenth Amendments. Appellant points, among other things, to the continuing presence of such variable elements as grand jury discretion to indict for a capital or non-capital version of the same offense, prosecutor discretion in bringing matters to the grand jury and in plea-bargaining proceedings thereafter, discretion in the Juvenile Division in whether it elects to retain or abjure jurisdiction over a juvenile offender, judicial discretion in finding the presence or absence of aggravating circumstances and/or mitigating circumstances under R. C. 2929.04(A) and (B), and, finally, discretion in the exercise of executive clemency.

The third assignment of error argues the *per se* invalidity of the death penalty under the Eighth and Fourteenth Amendments, urging us to adopt the view that "contemporary knowledge and standards of decency" have demonstrated the "inutility" of the measure as a detriment to crime, and have manifested a more sophisticated approach to the retributive aspects of punishment, as well as a greater knowledge of the possibilities of rehabilitation. These and other factors, argues the appellant, have led to a growing reluctance to resort

to this last enormous and irreversible step, a reluctance which, given the progressive non-static nature of the concept of "cruel and unusual punishment," has finally succeeded in the last half of this century in bringing that mode of punishment within the prohibition of the Amendment.

This argument, while not lacking in legal or humanitarian interest, fails on several grounds, it seems to us. First, it is difficult indeed to derive comfort from the Eighth Amendment as the source of an implied constitutional prohibition of the death penalty, when both the Fifth and Fourteenth Amendments *expressly* contemplate and forgive its use when accompanied by due process of law:

> No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . *be deprived of life* . . . without due process of law. . . .
>
> . . . nor shall any State *deprive any person of life* . . . without due process of law . . . .

To similar effect, see Sections 9 and 10, Article I of the Ohio Constitution.

Secondly, we are unable to derive any dispositive or even persuasive support for this argument from the final arbiters of all such arguably problematical constitutional language, the United States Supreme Court. In the *Furman* case, only two of the nine Justices stated unequivocal support for the proposition here advanced by appellant; the balance of the Justices either supported the constitutionality of the death penalty legislation in question, or found it lacking in detail but not necessarily in principle. Historically, of course, the appropriate use of the death penalty has judicial approbation. As Mr. Justice Douglas remarked in *Furman*:

> It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*, 136 U.S. 436, 447. 408 U.S. at 241.

See also *Wilkerson* v. *Utah*, 99 U.S. 130, (1878); *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947).

In sum, the arguments (and examples) offered by appellant to sustain his first three assignments of error are indistinguishable from those made to us and rejected by us in the recently decided cases of *State* v. *Reaves*, No. C-75022 (1st Dist., January 26, 1976) and *State* v. *Woods*, No. C-75047 (1st Dist., January 26, 1976), and require overruling on authority thereof. We note, in passing, the similar result reached by the Court of Appeals for Franklin County, Ohio, in *State* v. *Harris*, No. 74AP-580, decided June 10, 1975, and *State* v. *Royster, aka Shaw*, No. 75AP-195, decided August 26, 1975, both unreported, and cite with approval the language of Judge Whiteside in his concurring opinion in the *Harris* case:

> Regardless of one's personal views as to whether the death penalty should be used as punishment for crime, the only conclusion consistent with the Constitution itself is that the death penalty is not *per se* unconstitutional, and that the Legislative has the power to provide for the imposition of the death penalty so long as the means of imposition, the manner of determining when it is to be imposed, and the offenses for which it is imposed are neither discriminatory nor constitute cruel and unusual punishment. The mandatory Ohio death penalty, limited in its application to only the most serious types of aggravated murder, and predicated upon detailed factual determinations both as to guilt and mitigating circumstances, meets the constitutional test so as to neither be discriminatory nor constitute cruel and unusual punishment.

The first three assignments of error are overruled.

II.

The appellant's fourth assignment of error is phrased as follows:

> IV. Appellant was unconstitutionally coerced into waiving his right to trial by jury by the provisions of §§ 2929.03 and .04, R. C.

The argument here proceeds from the factual circumstances providing for the separation, under the Ohio statutes, of the trial to determine *guilt* pursuant to R. C. 2903.01 and 2929.03, from the trial to determine the *penalty* pursuant to R. C. 2929.03 and .04. The determination of guilt of both the offense and the specification of aggravating circumstances is by verdict of a jury unless waived in writing by the defendant, in which event it is by verdict of a three-judge panel. If a jury is not waived, the determination of penalty is made by the trial judge who presided over the jury trial. If, however, a jury *is* waived, the penalty is determined by the three judge panel which determined his guilt, under the following procedure:

> . . . if the court finds, or if the panel of three judges *unanimously* finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender. (R. C. 2929.03 (E) (Emphasis added).

Thus, if the defendant succeeds in convincing only one of the three judges on the panel that one or more of the mitigating circumstances listed in R. C. 2929.04(B) has been established by a preponderance of the evidence, the defendant will escape a sentence of death, as opposed to the argued greater difficulty in so convincing a single sentencing judge. This circumstance, argues the appellant, impels him to select trial by panel rather than trial by jury; the dread of a death sentence is so overwhelming in its compulsion, argues appellant, that it carries all other considerations before it, including what would otherwise constitute a clearly favorable and generally dispositive consideration, viz., the necessity of determining guilt beyond a reasonable doubt by the unanimous verdict of twelve jurors.

Clearly, the creation of a statutory scheme which deliberately, or effectively, even where unintended, discouraged or chilled to any substantial degree the undoubted right of a citizen of this State or of the United States to trial by jury of a criminal offense of the instant magnitude, could not constitutionally be tolerated. In *United States* v. *Jackson*, 390 U.S. 570 (1968) relied upon by appellant, the United States Supreme Court had before it a federal statute (18 U.S.C. § 1201(A)) which it determined to have precisely such discouraging effect. There, however, the statute providing punishment for conviction of kidnapping made the death penalty possible where trial was by jury, but unavailable where trial was by the court.[1] As was appropriately pointed out by Mr. Justice Stewart, speaking for the Court:

> One fact at least is obvious from the face of the statute itself . . . the defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury—and only the jury—to return a verdict of death. 390 U.S. at 572.

His waiver of trial by jury, on the other hand, and without more, spared his life. No such dramatic and compelling dichotomy is present in the statutes under review. Death is possible under either alternative, and it may be avoided under both alternatives under the Ohio statutes. Unlike *Jackson*, it is only in the arguably greater *possibility* of avoidance of death growing out of the requirement of unanimity within the panel, and not to its absolute avoidance, that appellant may find any comfort in R. C. 2929.03(E). Presumably, and paradoxically, appellant would find no constitutional flaw if the statute required the three judge panel to unanimously find the *presence* of a mitigating factor before it could avoid imposing death; but it may reasonably be doubted that this logic would in truth commend itself to the defendant anymore than it did to the General Assembly.

We do not, for these reasons, find *Jackson* to be controlling or persuasive authority for the question at issue. However, we do not wish to be understood as holding that a penalty or other statute which strongly inclined rather than actually coerced a defendant into waiving his right

to a jury trial, would escape the most searching scrutiny as to constitutional rectitude. There are obviously more ways of inducing conduct than bludgeoning someone over the head; statutes may be subtly as well as patently offensive. Were we, therefore, able to conclude from our reading of the statutes in question, or from our experience in dealing with them, that they were so designed, or that they so worked in practice, as to persuasively incline or induce a defendant toward a waiver of the constitutional right to trial by jury that he would otherwise be completely free to enjoy, we could follow appellant's argument with greater ease. Such does not appear to be the case here.

First, since our attention is focused by appellant's argument upon the greater possibility of convincing one out of three judges of the existence of mitigating factors than one judge alone, it seems entirely appropriate to note that there is also a greater possibility of convincing one or more out of twelve jurors of the absence of evidence of guilt beyond a reasonable doubt, than so convincing one out of three judges of the same fact. If the first factor inclines against a jury trial, the latter inclines toward it. The balance struck by these competing considerations is one for the judgment of competent trial counsel; we find no unfair tilt toward the latter which would require us to determine that the statutes unconstitutionally chill the right to trial by jury.

Second, we are reinforced in our above analysis by actual experience with the statutes since they became effective January 1, 1974. Thus, since January 1, 1974, there have been a total of 11 indictments for aggravated murder with specifications of aggravating circumstances in Hamilton County. Of this total, 7 were set for trial by jury, and only 4 of the 11 proceeded to trial before a three judge panel pursuant to waiver of jury trial. This scarcely suggests the existence of any substantial coercion or statutory tilt toward inducing jury waivers; to the contrary, it suggests that the balance referred to, supra, is still judged to lie on the side of twelve jurors determining the issue of guilt. The fourth assignment of error is overruled.

III.

The fifth assignment of error challenges the overruling of appellant's motion to suppress his inculpatory statement and its subsequent admission into evidence. The issue raised here is not as to the timing or adequacy of the *Miranda* warnings to Bell, since they were given early, frequently, and correctly, but rather derive from what is conceived to be Bell's special status as a minor: [2]

> Appellant challenges these rulings on the ground that a minor has the constitutional right to have the warnings mandated by *Miranda* v. *Arizona*, 384 U.S. 436, given to his parents as well as to himself before a statement could be taken and used against him, that he had a right to consult with parents and counsel before having to decide whether to waive his *Miranda* rights, and that he had a right to be told, and for his parents to be told, that the possibility existed that the statement might be used in an effort to kill him in the electric chair. In the absence of such warnings made to such persons, and their intelligent and knowing waiver by all such parties, his statement is involuntary and inadmissible. Appellant's brief at 32.

It will be recalled that the interrogating officer who took the statement from Bell testified that he first informed him that he could have his mother present while he made his statement (T. p. 73), that he called the mother and informed her that her son was being held for involvement in a homicide, robbery, and kidnapping (T. p. 73, 74, 107), and further asked her if she would like to be present when he gave the statement. The mother declined the offer of transportation to headquarters, declined the opportunity to be present at the interrogation, and Bell himself again declined to have his mother present when he was informed of this conversation. T. p. 73. After satisfying himself that appellant could read, and had in fact read the card waiving his *Miranda* rights, and that he understood the written and verbal recital of his constitutional rights and had no questions

with respect thereto, the interrogating officer took the statement.

We conclude from our review of the record that of the multiple events appellant would attach as conditions precedent to the receipt of incriminating statements from minors—and without commenting or ruling on the propriety or necessity thereof—only two may be said to have been absent in the instant case: no *Miranda* warnings were given to the mother; and no one told her that her son stood in possible jeopardy of the death penalty.[3]

Appellant concedes that neither proposition has support in Ohio authorities, and has cited to us no case from any jurisdiction lending support to the latter proposition, which we find to be without merit. Whatever duty the officer had to communicate with Bell's mother, he concededly did so before taking Bell's statement and told her that her son was being held in connection with a homicide, an armed robbery and a kidnapping. This was the sum of the officer's knowledge at that point and was fairly communicated to the mother, who nevertheless declined personal involvement in the interrogation. Any further advice by the officer as to a possible death penalty would have been the purest speculation on his part, since Bell did not actually stand in jeopardy thereof until indictment by the Grand Jury on a charge of aggravated murder with a specification of an aggravating circumstance. Moreover, we are given no reason to assume that a mother who is unmoved by the litany of heinous charges against her son, as related to her by the officer, will be moved by a recital of possible penalties, even the ultimate penalty.

We are left then with the question of whether *Miranda* v. *Arizona*, 384 U.S. 436 (1966) and its progeny dictate that the *parents* of a minor shall be given a reading of constitutional rights along with their child and whether, by extension, both are then required to intelligently and voluntarily waive those rights as a condition to the constitutional competence of inculpatory statements from the minor. We find nothing in *Miranda* which could dictate that result, although it may be conceded that

when a minor is sought to be interrogated, the question of whether he knowingly and willingly waives constitutional rights cannot always be decided by the same criteria applied to mature adults. Cf. *Haley* v. *Ohio*, 332 U.S. 596 (1948); *In re Gault*, 387 U.S. 1 (1967). Thus, we have no quarrel with the language of the United States District Court in *United States ex rel. B.* v. *Shelly*, 305 F. Supp. 55 (E.D.N.Y. 1969), relied upon by appellant:

> Maturity is obviously a factor in assessing understanding, whether a confession . . . or *Miranda* rights are involved. . . . While *In Re Gault*, 387 U.S. 1 (1967) . . . has not made a relinquishment of constitutional rights by a juvenile in the absence of parents or adult friends impossible, it teaches us to be cautious in finding a meaningful waiver by a lone child. *Id.* at 58.

Nor would we question the wisdom of Judge Weinstein's further comment in *Shelly* that:

> Where a child is involved, a period to compose himself and to obtain the assistance of a mature adviser must be granted if there is to be any assurance that he knowingly waived vital constitutional rights. . . . *Id.* at 59-60.

However, we can find nothing in the instant record which would violate any of these precepts. Bell was, in fact, afforded the opportunity to consult with a lawyer or with his mother, and did, in fact, have a period to compose himself while the officer consulted with his mother. There is nothing in the record of this case bearing any remote resemblance to the assault by officialdom on a "frightened and tired" child that worked the impermissible conduct in *Shelly*. Cf. *State* v. *White*, 494 S.W. 2d 687 (Mo. App. 1973). Indeed, we are impressed with the meticulous care with which the police approached the rights of Bell, and which surrounded the taking of the statement, and are unable to conclude that the statement was given in other than a willing and knowing fashion by a subject who, though a minor, was both reasonably intelligent and

knowledgeable, and who thoroughly understood and voluntarily and intelligently waived his constitutional rights, including any right to the presence of a mature advisor.

To the extent that *Lewis* v. *State*, 288 N. E. 2d 138, 142 (Ind. App. 1972) seems to hold (in addition to the criteria outlined above and found present here) that "a juvenile's statement or confession cannot be used against him at a subsequent trial or hearing unless *both he and his parents or guardian* were informed of his rights to an attorney, and to remain silent," we decline to follow such rule. We also note that in the *Lewis* case, unlike our own, the juvenile's mother was not contacted until *after* the confession was taken (although that factor would not seem to affect the broadly stated Indiana rule as quoted above). We hold, therefore, that where the State has satisfied its undoubted burden of proving that an inculpatory statement by a minor was voluntarily made pursuant to an intelligent and willing waiver of constitutional rights concerning which he was fully advised, under circumstances demonstrating due regard for the fact that the tender years of the accused require an even more scrupulous attention to the foregoing issues of voluntariness and understanding than in the case of an adult, the overruling of a motion to suppress such statement and its subsequent introduction into evidence was not error simply because the police neglected or declined to charge the mother, or other mature advisor, with the accused's *Miranda* rights.

Appellant's fifth assignment of error is overruled.

IV.

Appellant's sixth assignment of error asserts that the finding of guilt was contrary to law and to the manifest weight of the evidence, and is predicated on the argued absence of evidence that Bell participated in the actual killing of Graber, or in the planning of it. From this, appellant argues that Bell's connection with the crime of homicide was, at best, as an aider and abettor of Hall's crime, and that absent evidence that Bell advised, hired, incited, commanded, counselled, and intended the murder, he may not be convicted therefor. We disagree.

First, we do not agree that there was no credible evidence from which the court could have concluded that Bell participated in the killing. It must be conceded that Bell was intimately involved in the kidnapping and armed robbery; his own statement confirms it. Further, the evidence of Bell's own statement shows that he drove the car into the deserted cemetery and that he asked his companion: "What was we going to do now?" T. p. 340. Further, against Bell's statement that he remained in the car while his companion Hall released the victim from the trunk, took him into the woods, shot him the first time, returned to the car for another shell, reloaded the gun and then returned to shoot the pleading Graber yet a second time, we have the evidence of the witness, Pierce, who distinctly heard *two* car doors slam before the shots, and *two* car doors open *after* the shots. Moreover, the court was not required to believe that Graber lay supinely with his hands behind his head while his assailant left him alone to return to the car to reload his gun. Evidence of bruises about the body of Graber, the comment of Bell to Hall, the physical circumstances surrounding the slaying, and the testimony of Pierce, all would have justified the trier of fact in disregarding Bell's version of the killing, and in concluding that Bell either committed or, actively assisted Hall in murdering the victim.

Additionally, even if Bell's version of the slaying had been accepted by the court, i.e., that he remained in the car while Hall murdered the victim of their joint kidnapping and armed robbery [illegible]ture, we do not understand the law of this State to dictate Bell's acquittal of the charge of aggravated murder. One may aid and abet the commission of a crime without being physically present when it is committed. *Browning* v. *State*, 21 Ohio L. Abs. 218 (1935); 15 O Jur 2d CRIMINAL LAW § 52. There is abundant credible evidence, already reviewed herein, to have permitted the triers of fact to conclude that Bell well knew the probable outcome of the encounter in the cemetery woods between his armed companion and the victim. Had simple robbery or ransom been the principal motive, the circumstances of the trio's presence in the cemetery would have been without purpose and

the slaying utterly pointless; these facts could not have escaped Bell's attention. Yet—crediting his own story—he participated in the abduction, drove the car to the scene of the murder, sat by awaiting what he must have known would be a killing, and assisted in the escape. That evidence alone is sufficient to sustain the court's finding of guilt, for clearly, under the applicable statute, one who aids and abets another in committing an offense is guilty of the crime of complicity and may be prosecuted and punished as if he were the principal offender. R. C. 2923.03(A)(2). It is not challenged that the charge may be stated in terms of the complicity statute, or in terms of the principal offense, as here. R. C. 2923.03(F). We hold that the court did not err in determining Bell's guilt, either as a principal in the murder, or as an aider and abettor in the slaying; the evidence is sufficient to sustain either theory. Appellant's sixth assignment of error is overruled.

V.

The seventh assignment of error asks us to find prejudicial error in the refusal of the trial court to strike testimony of certain witnesses for the State whose intended presence (and/or criminal records) were not earlier made known to appellant pursuant to requests for discovery. We find this assignment of error totally without merit. In most of the instances complained of, the State was either not in possession of the information in advance of trial, or had orally transmitted it to appellant's counsel as it became available during the course of the proceedings. In each instance, the trial court made careful inquiry of possible prejudice to the appellant, and concluded that none existed. We agree. The assignment of error is overruled.

VI.

Next, appellant asserts that the finding of the panel that appellant had not met his burden of proof during the "penalty trial" as to the presence of one or more mitigating factors was contrary to the manifest weight of the evidence and contrary to law. The thrust of appellant's argument here is addressed to the third mitigating circumstance contained in R. C. 2929.04(B)(3), to wit:

> The offense was primarily the product of offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Appellant concedes that there is no suggestion of psychosis to be found in the record, but relies on the argued presence of "mental deficiency," per se. Hereunder, he is faced with the unanimous opinion of the three psychiatrists who examined him after the determination of guilt, and in connection with the penalty proceedings, that he was neither psychotic nor mentally deficient, nor that the offense was the product of either of these conditions. To the contrary, Bell was found to be "very sharp," to have an estimated I.Q. of 110-120, which would be above average, to have played chess while in jail with sufficient skill to rank as the first or second-best player there. He was, however, found to be "easily led" and "there was strong motivation to follow along with Mr. Hall." T. p. 542.

The findings of the psychiatrists after trial varied somewhat from their earlier conclusions, when they had determined Bell to be competent to stand trial. At that time, his I.Q. was determined to be about 90, he appeared subdued and "not . . . capable of much remorse." Although found to be fully in contact with reality and not suffering from "mental defect or mental illness," he was not "able to fully appreciate the gravity of the situation that he was in—the seriousness of the overall situation." He was probably less "mature" than the average 16 year old, but fully capable of understanding the trial process and of assisting in his defense. T. p. 11-12.

This apparent lacunae, however, is filled by further examination of this record. The difference between the two findings was attributed by the psychiatrists to the improvement in living conditions brought about by being in jail over Bell's previous unconfined experience, and particularly in the absence of hallucinogens (mescaline):

BY MR. MECHLEY:

Q. Just briefly, doctor. I think you probably already answered it, but I notice some distinctions between your first report on the 30 and your subsequent report on the 23, and I believe you said that this may have been the result of the fact that he was still under the influence of drugs on the 30, or perhaps coming out of that.

A. No. I didn't mean to imply that, but I think, being in prison for this period of time and being away from drugs and being regular in his living situation, he seemed a lot clearer, a lot more tuned-in; perhaps the focus of the second examination was a little different, too.

Q. So that it is a fact that, assuming one had been on drugs, assuming one had been drugged during that particular time, that the longer one could keep them off drugs, assuming a good diet and assuming a standard, ritual routine, assuming sometime later, 60 days, 80 days, 100 days, one would get a better report, a better idea of how they are handling themselves at that time?

A. Should, yes. T. p. 543-44.

The sum of the evidence and testimony of the psychiatrists, psychologists, probation department, school authorities, and others thus fails to sustain appellant's position. The picture one derives is unpleasant but not unfamiliar—an unsatisfactory home, absence of familial or other supervision, involvement with drugs, inability to cope with school demands, and so on. While appellant's history is one from which the social psychologist may arguably find a degree of exculpation, it nowhere rises to the level of proof required to establish an R. C. 2929.04 (B) (3) circumstance. The offense was simply not shown to be the product of mental deficiency, and the panel did not err in so finding, or in finding that appellant did not meet his burden of proof during the penalty trial generally.

Appellant's eighth assignment of error is overruled.

VII.

Next, in his ninth and final assignment of error, raised by leave after submission of briefs and oral arguments, the appellant asserts that the trial court was without jurisdiction to hear the cause by reason of double jeopardy, namely, that Bell had previously been subjected to a hearing in the Juvenile Division on the identical offenses for which he was herein indicted, tried and convicted. Appellant's theory rests on the cases of *Breed* v. *Jones*, 421 U.S. 519, 95 S. Ct. 1779 (1975) and *Brenson* v. *Havener*, 403 F. Supp. 221 (N.D. Ohio 1975), wherein juveniles had been adjudicated delinquents before being bound over for trial as adults on identical offenses. These cases, however, are factually inapposite to the cause before us, and the argument is not well taken.

Thus, in the instant matter, the transcript of the docket reveals that while Bell had indeed been the subject of a hearing in the juvenile division, said proceeding was the *non*-adjudicatory *probable cause* hearing prescribed by R. C. 2151.26,[4] a procedure designed to protect the juvenile, and a procedure wherein the merits are not reached. Cf. *In re Winship*, 397 U.S. 358, 367 (1970); *State* v. *Carmichael*, 35 Ohio St. 2d 118, cert. den. 414 U.S. 1161 (1974).

Accordingly, it is plain, and we so hold, that where a juvenile offender is subjected to no more than the statutory probable cause hearing under R. C. 2151.26 before his bind-over to the court of common pleas to be tried as an adult, and where, as here, there is no adjudication of delinquency in consequence of said probable cause determination, jeopardy does not attach and there is no impediment thereafter to the common pleas court's taking of jurisdiction. The assignment of error is overruled.

The judgment is affirmed.

SHANNON, P. J. and WHITESIDE, J., CONCUR.

WHITESIDE, J. OF THE TENTH APPELLATE DISTRICT SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

1. This statute . . . creates an offense punishable by death "if the . . . jury shall so recommend." The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleas guilty. 390 U.S. at 571.
2. Bell's birth date was December 12, 1957; he was therefore two months short of 17 when the homicide occurred.
3. An additional "condition" which appellant argues, that the appellant and/or his parents must be advised that the Juvenile Division "had the power to relinquish jurisdiction and order him tried as an adult," we reject as meritless. No authority is cited in support of such proposition, and no reason for its adoption commends itself to us.
4. See Entry of November 4, 1974, *In re Willie Lee Bell*, J. C. 74-08044, Hamilton County Court of Common Pleas, Juvenile Division.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

E. Order of the Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES

No. 76-6513

WILLIE LEE BELL, PETITIONER

v.

OHIO

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

June 27, 1977

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